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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*K. B. N. Singh, CJ. and P. Venugopal, J.*

A. Durairaj .. *Appellant**

v.

Union of India, represented by Ministry of Railways, New Delhi and others .. *Respondents.*

Constitution of India (1950), *Article 226—Four branches of Railway Signalling and Telecommunication department — Merger of employees into a single cadre at a particular stage of their service as class III — Common examination held for promotion to class II — Scheme if unfair to particular group — Writ proceedings—Summary in nature—Court cannot decide disputed facts.*

Where employees from the four different branches of the Signals and Telecommunication Department of the Southern Railway in a particular stage of service merged as a single entity with a common seniority roster forming class III employees had to take a common examination for being promoted to class II and the scheme of such examination was challenged as invalid and discriminatory in writ proceedings,

Held: A cadre having been formed in class III drawn out of the four branches different tests cannot be prescribed for determining the respective promotion opportunities. The test for promotion to class II can be only one common to all the branches. Whether the scheme of the examination operates to the disadvantage of a particular class of candidates being a disputed fact whose adjudication can only be after taking evidence, and considering the nature of the syllabus and other factors, the Court cannot interfere in the exercise of writ jurisdiction. [*Paras.* 7 *and* 8.]

The High Court, sitting in appeal, cannot go into disputed questions which have to be decided on proper evidence, and not on the basis of allegations and counter-allegations. Proceedings under Article 226 of the Constitution are of a summary nature and not suitable for adjudication of disputed facts. [*Para.* 8.]

Case referred to:—

State of Mysore v. P. Narasing Rao, (1968) 1 S.C.J. 863: (1968) 1 S.C.R. 407: A.I.R. 1968 S.C. 349.

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice Mohan, dated 18th December, 1980, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6910 of 1980 presented under Article 226 of the Constitution of India to issue a writ of *certiorarified mandamus* calling for the records pertaining to order bearing No. P (G) (532)|IX|Vol. V, dated 21st November, 1980, of the Chief Personnel Officer, Southern Railway, Head Quarters, Madras-3, and quashing the said order, in so far as the petitioner is concerned, and directing him to initiate fresh selection of candidates from the Signal and Telecommunication Department of the Southern Railway, for promotion to Class II Posts, after eliminating the discriminatory aspects of the regulations governing such selection.

M. Raghavan, for Appellant.

G. Ramaswamy for *G. Venkateswara Rao*, for Respondents.

*W.A. No. 778 of 1980.
14*th October*, 1982.

The Order of the Court was made by

Venugopal, J.—The writ petitioner is the appellant before this Court. He is a Class III Employee in the workshop branch of the Signals and Telecommunication department in the Southern Railway. There are 4 branches in the department and they are:— (1) Signals branch; (2) Telecommunication branch; (3) Workshop branch; and (4) Drawing branch.

The seniority of the employee in each branch is reckoned within that branch till they reach a pay scale of Rs. 700-900 and Rs. 840-1,040, and thereafter they are merged as a single entity within a common seniority roster, and they constitute Class III employees, in the Signals and Telecommunication department. The next avenue of promotion for them is Class II. Promotion to Class II posts are made on the result of a written examination followed by a *viva voce* test of candidates who qualify in the written examination. The written test consists of three papers. Part I of Paper I and Part I of Paper II are common and compulsory to all the four branches *viz.*, Signals, Telecommunication, Workshop and Drawing. Contending that the compulsory questions under Part I in both Papers I and II are all signal-oriented and the workshop candidates without previous training in Signals and Telecommunication department, are unable to answer these compulsory questions which have a practical bias, the appellant filed a writ petition to issue a writ of *certiorari* or other appropriate relief to quash the order of the third respondent issued in No. P (G) 532|IX|Vol. V, dated 21st November, 1980, in so far as the petitioner is concerned, and to initiate fresh selection of candidates from the Signals and Telecommunication department for promotion to Class II posts.

2. The respondents filed a counter stating that the written examination forming part of the selection is held strictly in conformity with the rules on the subject and the employees from the four streams have no difficulty in answering them, and there is no discrimination or irregularity of treatment, as alleged by the writ petitioner.

3. A learned single Judge of this Court held that holding of examination for persons who are held in a common roster would not constitute any discrimination and the Court exercising writ jurisdiction cannot interfere in such internal matters which are purely within the realm of method of selection, and on these findings the writ petition was dismissed. Against the order of the learned single Judge, the writ appeal is filed before this Court.

4. The learned counsel for the appellant contended that workshop candidates for their promotion from Class III to Class II in the Signals and Telecommunication department, have got to compulsorily answer the whole of Part I of Paper I and Part I of Paper II, and workshop candidates having no practical training in signals and telecommunication branches, cannot answer the compulsory questions in Paper I and Paper II which are designed to test the ability of the candidates to tackle the practical problems they are likely to face in Signals and Telecommuncation branches and as the scheme of examination is discriminatory and operates to the disadvantage of one category of employees *viz.*, workshop candidates, it has to be struck down as offending both Articles 14 and 16 of the Constitution.

5. Relying on the decision of the Supreme Court reported in *State of Mysore and another* v. *P. Narasing Rao*[1], the learned counsel for the respondents contended that the provisions of Articles 14 and 16 do not exclude the laying down of selective tests, nor do they preclude the Government from laying down qualifications for the post in question and so long as there is reasonable relation of the prescribed test to the suitability of the candidate for the post, and there is relevant connection between the test prescribed and the interest of public service, there is no violation of Article 14 or Article 16 of the Constitution.

6. The respondents' right to hold a test to ascertain the suitability of the candidate for being promoted to Class II cannot be disputed in view of the decision relied on by the learned counsel for the respondents. There is also relevant connection between the test prescribed and the interest of public service.

7. Though there are four branches in Signals and Telecommunication department of the Southern Railway, when the incumbents reach a particular pay scale, they are merged as one

1. (1968) 1 S.C.R. 407: (1968) 1 S.C.J. 863: A.I.R. 1968 S.C. 349.

single entity with a common seniority roster before they could appear for the promotion test for Class II. As a cadre has been formed in Class III drawn out from the four branches in the Signals and Telecommunication department, different tests cannot be prescribed for determining the respective promotional opportunities. Though drawn from four different branches they are put in the same cadre of Class III, and the test prescribed for the promotion to Class II can be only one, common to all the four branches. Even after promotion to Class II, they are interchangeable to any of the four branches till they are promoted as Divisional Engineers or equivalent grade in workshop as Works Manager or Production Engineer.

8. When the respondents have the right to hold the promotion test for Class II, and it can be only one test for all the four branches, the only question that remains to be considered is whether the scheme of examination is discriminatory and operates to the disadvantage of the workshop candidates. The main contention of the appellant is that Part I of both Paper I and Paper II are compulsory for all the candidates, and only the candidates who had previous training in signals and telecommunication branch can answer those questions which have a practical bias, and as the workshop candidates have no previous experience in signals and telecommunication branches, they are unable to answer the compulsory questions in Paper I and Paper II, with the result their promotional prospects are adversely affected. Part I of Paper I are questions on signalling. Though it is compulsory to all, candidates from the Telecommunication branch or from the drawing branch have not come forward with the plea that they find it difficult to answer the compulsory questions in Part I of Paper I. Similarly, Part I of Paper II are questions on Telecommunication, and though it is compulsory to all, candidates from the signals branch or from the drawing branch have not come forward with the plea that they find it difficult to answer those compulsory questions. Excepting the appellant, the others in the workshop branch have not come forward with the plea of difficulties in answering the compulsory questions in Paper I and Paper II. The Railway Board has prescribed the syllabus for the promotion test for Class II. It is stated on behalf of the respondents that the instruments used in signals branch and telecommunication branch are manufactured in the workshop only and the workshop candidates can answer the compulsory questions in Paper I and Paper II. The learned counsel for the appellant stated that no candidates from the workshop branch have so far passed in the written test as the compulsory questions in Paper I and Paper II heavily weigh against the workshop candidates in view of their lack of training in signals and telecommunication branches. The learned counsel for the respondents states that two workshop candidates, Radhakrishnamurthi and Purushothaman, have passed the written test and have been promoted to Class II. The learned counsel for the appellant then stated that they had initial training in signals and telecommunication branch and hence they were able to pass the written test. The learned counsel for the respondents further stated that all the workshop candidates have also initial training in the signals and telecommunication department, and this is disputed by the learned counsel for the appellant. The question whether a workshop candidate can answer the compulsory questions of Part I of Paper I and Part I of Paper II without practical training in signals and telecommunication branch, has now become a disputed question of fact. To adjudicate on such an issue, one has to scrutinise the syllabus, the type of compulsory questions and work in the workshop, and for all these matters evidence has to be adduced. This Court, sitting in appeal, cannot go into such disputed questions which have to be decided on proper evidence, and not on the basis of allegations and counter-allegations. Proceedings under Article 226 of the Constitution are of a summary nature and not suitable for adjudication of disputed facts which we are facing in the present case. We, therefore, refrain from deciding this disputed issue whether the scheme of examination operates to the disadvantage of workshop candidates. Though we have refrained from adjudicating this disputed issue, we hope and express our desire that this matter should be reviewed by the concerned authorities, and if the scheme of examination for promotion to Class II weighs against the workshop candidates and works to their disadvantage, it should be immediately rectified. A letter from the Deputy Chief Personnel Officer, dated 7th September, 1982, was pro-

duced in Court in which it is stated that if an eventuality arises for filling up the posts of ASTEs on an *ad hoc* basis pending posting of duly selected employees, the claims of the appellant along with others, will be considered for *ad hoc* promotion. As the appellant is a Scheduled Caste Candidate and has to serve in the Department for a number of years, it may also be considered whether his name can be included in the promotion panel, on an *ad hoc* basis, without loss of seniority. With these observations, the writ appeal is dismissed, in the circumstances, without costs.

K. B. N. Singh, CJ.—After the judgment was delivered, an oral prayer was made by the learned counsel for the appellant for a certificate under Article 135 (1) of the Constitution. We are not satisfied that any substantial question of law of general importance is involved in the case which in our opinion needs to be decided by the Supreme Court. The prayer for Certificate is refused.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:— *G. Ramanujam and R. Sengottuvelan, JJ.*

N. Rajakumar .. *Appellant**

v.

The Management of Indian Bank, represented by Chairman and Managing Director, Rajaji Salai, Madras-1

.. *Respondent.*

and

Tamil Nadu Bank's Depost Collectors' Union, 31, Noor Street, Madras-1, represented by C. Jagannathan

.. *Appellant,*

v.

Canara Bank, represented by the General Manager, Development Section 112, J. C. Road, P.O. Box No. 6648, Bangalore-560 006 .. *Respondent.*

Constitution of India (1950), *Articles* 14, 226, 41 *and* 46—*Nationalised Banks—Tiny Deposit Scheme—Discontinuance of—Deposit Collectors losing commission—Whether could maintain a writ—Starting or discontinuing a deposit scheme a policy matter with banks—Directive principles not inforceable by Courts—Discontinuance not arbitrary.*

It cannot be said that the starting of a deposit scheme or the closing thereof by nationalised banks amounts to a public duty enforceable by a Court of law by the issue of a writ of *mandamus* directing them to start a particular deposit scheme or forbear them from discontinuing a scheme.

The starting of a new deposit scheme or the closing thereof by the Bank would normally be guided by various factors which the bank has to take into consideration. Merely because the banks have chosen to stop a deposit scheme, the Court cannot restrain them from

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*W.A. Nos. 363 and 366 of 1982.

15th July, 1982.

discontinuing the scheme if the banks come to the conclusion that the functioning of the scheme is not either beneficial - to the public or to the proper or economic functioning of the banking operations. Merely because the Deposit Collectors will lose their commission if the deposit schemes were to be discontinued, it is not a ground for interfering with the discontinuance of the scheme which is purely a policy matter to be decided by the bank. [*Para.* 7.]

Even assuming that the deposit schemes originally started by the concerned banks and were discontinued on the basis of the impugned circulars were beneficial to the weaker sections of the society and come within Directive Principles it is not for the Court to intervene and forbear the banks from discontinuing the same. The Directive Principles are not enforceable by Courts. [*Para.* 7.]

The petitioners' entitlement to commission flows from the agreements entered into with the banks in respect of their functions as deposit-collectors and such a right flowing from a contract can never be treated as a fundamental right. If at all it will be a contractual right for which they have effective and suitable remedies under the common law.

[*Para.* 8.]

The banks in the course of their normal functioning may start various deposit schemes and if on their working they find some deposit schemes are economical and other deposit schemes are not so economical, it is always open to the banks to discontinue the schemes which are not economical or beneficial to the public. Merely because one scheme is continued while another scheme is discontinued by the bank, a complaint of arbitrariness cannot be levelled against the banks.

[*Para.* 9.]

Appeals under clause 15 of the Letters Patent against the Order of Mr. Justice Mohan, dated 18th June, 1982, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 3796 and 3797 of 1982 presented under Article 226 of the Constitution of India to issue writs of *certiorarified mandamus* calling for the records of the respective respondent (1) in circular No Z.M. 13 Dev 3:82, dated 19th February, 1982, and quash the said circular in so far as the petititoner is concerned and direct the respondent bank to allow the petitioner to continue to do his business as Tiny Deposit Collector by enumerating new customers to earn his commission and award costs (in W.P. No. 3796 of 1982) and (2) in Circular No. 35 of 1982, dated 25th January, 1982, and quash the same and direct the respondent to forbear from giving effect to the impugned circular in so far as it relates to the Nithyanidhi Deposit Collectors who are concerned (in W.P. No. 3797 of 1982) respectively.

Aiyar and *Dolia*, for Appellant.

The Judgment of the Court was delivered by

Ramanujam, J.—Since the issues involved in both these writ appeals are substantially the same, they are dealt with together. Writ Appeal No. 363 of 1982 arises out of the judgment of Mohan, J., in W.P. No. 3796 of 1982 and Writ Appeal No. 366 of 1982 arises out of the jugdment of the same learned Judge in W.P. No. 3797 of 1982.

2. The first writ petition has been filed by one Rajkumar for the issue of a writ of *certiorarified mandaums* for quashing the circular dated 19th February, 1982, issued by the Management of the Indian Bank and to direct the said bank to allow him to continue to do his busines as Tiny Deposit Collector by enumerating new customers to earn his commission. The other writ petition has been filed by the Tamil Nadu Banks' Deposit Collectors Union for quashing a somewhat similar circular issued by the Canara Bank and for a direction forbearing the said bank from giving effect to its circular so far as it relates to the Nithyanidhi Deposit Collectors.

3. The circumstances under which the impugned circulars had been issued by the respective banks may briefly be stated. The Indian Bank evolved a scheme for mobilising small deposits from sections of public like traders, wage-earners, transport operators, fishermen, farmers etc., who could save small amounts daily or weekly. The petitioner in W.P. 3796 of 1982 is one of the Tiny Deposit Collectors Ashok Nagar Branch of Indian Bank. The Tiny Deposit Collectors will go to these tiny depositors and collect the deposits.

The Deposit Collectors open accounts and collect the deposits from the customers and the amounts collected will be deposited in the Bank. They will get a commission at the rate of 3 per cent. on the total collections made by them for each month. They have to provide a cash security of Rs. 500 at the time of executing the agreement. Ten per cent. of the commission earned by them will be withheld by the Bank as security for their good behaviour as per the terms of the memorandum of agreement. By circular, dated 19th February, 1982, addressed to all the branches in the Zone it was stated that the intention of the Bank was to discontinue opening of new accounts under the Tiny Deposit Scheme and that therefore, the branches were not to open fresh accounts under the said scheme. It is the validity of the said circular that has been challenged in W.P. No. 3796 of 1982 and the impugned circular is as follows:

> "*To all branches of our Zone*
>
> Dear Sir,
>
> Ref: *Tiny Deposit Scheme*
>
> It has been decided by our Head Office to discontinue opening of fresh accounts under the Tiny Deposit Scheme. Hence, branches are instructed not to open fresh accounts under the scheme. Hereafter a suitable advertisement will be published in newspapers shortly by our Head Office for information of public."

4. The petitioner in W.P. No. 3797 of 1982 is the Tamil Nadu Banks' Deposit Collectors Union represented by its General Secretary, one C. Jagannathan, and the circular challenged in the said writ petition is the one issued by the Canara Bank. There were two schemes started by the Canara Bank, namely Nithyanidhi and Balakshema Scheme. The Deposit Collector's Commission was 2½ per cent. when the average weekly collections was more than Rs. 1,500 and when it was below Rs. 1,500 the Commission was 2 per cent. The Deposit Collectors were said to have been granted conveyance allowances, interest-free vehicle loans, etc., by the Bank. The Bank is also stated to have contributed to the contributory benefit fund in respect of the Deposit Collectors. If the commission earned by the Deposit Collectors fell short of Rs. 60 in rural-semi urban areas and Rs. 90 in urban metropolitan centres for the first three months, the short-fall would be made up by the Bank. However, by a circular, dated 25th January, 1982 the Bank instructed its branches not to receive future deposits under the Nityanidhi Deposit Scheme. It is the said circular which has been impugned in this writ petition.

5 According to the learned counsel for the petitioners, the circulars by which the opening of fresh accounts under the Tiny Deposit Scheme in one case and the Nityanidhi Deposit Scheme in the other affect the petitioner's fundamental right to work under Article 19 (1) (*g*) of the Constitution, and the discontinuance of the scheme in both the cases is against public interest. Its continuance will be not only in the interest of the public but it will also serve the nation's economic interest and the policy of the Government to mobilise all savings, particularly from the tiny sector which consists of mostly the poor strata of the society. It is also pointed out that the continuance of the scheme will be in furtherance of the directive principles contained in Articles 41 and 46 of the Constitution. It is further pointed out that the discontinuance of the deposit schemes adversely affects the interests of the Deposit Collectors, in that it will not only affect the average remuneration which they are now getting but also their future prospects of employment. The contention on this behalf advanced by the petitioners is as follows: Though the Deposit Collectors are paid commission in proportion to the collections made, it will come under the definition of wages which is normally taken to be "property" within the meaning of Article 300-A of the Constitution and the circular in so far as it affects or reduces their wages, takes away their right to property which cannot be done except with the authority of law as contemplated under Article 300-A of the Constitution.

6. Mohan, J., who heard the said writ petitions dismissed the same *in limine* on the ground that the petitioners have no fundamental right as claimed by them, that the right which they can claim only flows from a contract of employment as commission agents and that the mere fact that the circulars affect their contractual right, if any, will not be a ground for invalidating the circulars, whatever other remedies the petitioners may have as regards the reduction in emoluments arising out of the discontinuance of the Deposit Scheme.

7. In these appeals, the correctness of the view expressed by the learned Judge has been canvassed. However, after hearing the counsel in both the cases at length, we are of the view that Mohan, J., has come to the right conclusion. The respondent Banks can commence and close any deposit scheme in accordance with the policy laid down by them and it cannot be said that the starting of a deposit scheme or forbear them from discontinuing public duty which can be enforced by a Court of law by the issue of a writ of *mandamus* directing them to start a particular deposit scheme or for bear them from discontinuing a scheme. The starting and closing of a deposit scheme being purely a policy matter to be decided by the Banks themselves, it is not open either to the petitioners or the Court to tell them to start a particular deposit scheme or to stop or discontinue a deposit scheme which they have already initiated. The starting of a new deposit scheme or the closing thereof by the Bank would normally be guided by various factors which the Bank has to take into consideration. Merely because the Banks have chosen to stop a deposit scheme, the Court cannot restrain them from discontinuing the scheme, if the Banks come to the conclusion that the functioning of the scheme is not either beneficial to the public or to the proper or economic functioning of the Banking operations. If the deposit scheme has not been started by these Banks it cannot be disputed that this Court cannot direct the Banks to start such a deposit scheme, even if the Court were to come to the conclusion that the starting of the scheme will in its view be beneficial to the public. If the Court cannot direct any particular Bank to start any particular scheme, it has equally no power or jurisdiction to forbear them from discontinuing any deposit scheme which has been in existence. Merely because the Deposit Collectors will loe their commission if the deposit schemes were to be discontinued, it is not a ground for interfering with the discontinuance of the scheme which is purely a policy matter to be decided by the Bank. In starting a new deposit scheme or in discontinuing an existing deposit scheme the Bank is not doing any public duty or a statutory duty, in which case alone the Court can intervene and direct the Bank to act in a particular manner. Even assuming, that the deposit schemes which were originally started by the two Banks and which were now discontinued on the basis of the said circulars were beneficial to the weaker sections of the society, and came within the directive principles contained in the provisions referred to above, even then it is not for Court to intervene and forbear the Bank from discontinuing the same. It is well-established that the directive principles are not enforceable by Courts and therefore on the ground that the action taken by the two Banks is against the directive principles referred to above this Court cannot give a direction to the respondent-banks to specifically enforce the directive principles by directing them to continue the deposit scheme.

8. Coming to the appellants' contention that their fundamental right is affected in that their remuneration will stand curtailed, we do not see how the petitioners can claim to have a fundamental right. Their entitlement to the commission flows from the agreement which they have entered into with the Banks in respect of their functions as Deposit Collectors and such a right flowing from a contract can never be treated as a fundamental right. If at all it will be a contractual right and for breach of any contractual right, the appellants have got effective and suitable remedies under the common law. Merely because the circulars ultimately result in the reduction of their emoluments, a *mandamus* cannot be issued to the Banks to continue the deposit schemes purely for the benefit of persons like the appellants.

9. It is also contended that while other deposit schemes are being continued by the Banks, only the Tiny Deposit Scheme in one case and the Nityanidhi Deposit Scheme in the other case had been discontinued and this amounts to clear discrimination which is violative of Article 14 of the Constitution. We are not able to appreciate the above argument. The Banks in the course of their normal functioning may start various deposit schemes and if on their working they find some deposit schemes are economical and other deposit schemes are not so economical, it is always open to the Banks to discontinue the schemes which are not economical or beneficial to the public. Merely because one scheme is continued while another scheme is discontinued by the Bank, a complaint of arbitrariness cannot be levelled against the Banks. We are

therefore of the view that the reliance of Article 14 of the Constitution by the appellants is not tenable at all.

10. It is pointed out that in the case of Nityanidhi Deposit Scheme initiated by the Canara Bank, the Deposit Collectors have practically become the employees of the Bank though remuneration is being paid by way of commission on the average weekly or monthly collections made by them, and as a result of the discontinuance of the said scheme, these Deposit Collectors will lose a part of their remuneration. Even assuming that the commission earned by the Deposit Collectors amounts to remuneration and that relationship between the Bank and the Deposit Collectors is that of a master and servant, still no direction could be issued by this Court to the Bank to continue the Nityanidhi Scheme so as to enable the Deposit Collectors to get their full salary. If any reduction in the so-called salary has resulted by the discontinuance of the Nityanidhi Scheme, it is always open to the concerned Deposit Collector or all the Deposit Collectors to approach the proper forum and seek suitable relief against the bank either for monetary benefit or for other reliefs. But that is not a ground for directing the management not to discontinue the Nityanidhi Scheme.

10. In this view of the matter, we are in entire agreement with the view expressed by Mohan, J., while dismissing the writ petitions. The writ appeals are therefore dismissed.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENTS—*G. Ramanujam and G. Maheswaran, JJ.*

M. V. M. Mahalingam Chettiar .. *Petitioner**

v.

The Appellate Authority (Sub-Collector), Kumbakonam and others .. *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), sections 5 and 6—Money advanced on promissory notes—Suit for recovery of the amount—Pending the suit application by debtor to Special Tahsildar seeking a certificate of discharge—Tahsildar issuing certificate — Order confirmed on appeal by Sub-Collector — Tahsildar, if has jurisdiction to issue certificate in respect of mere money claims.

Where the debt is incurred under promissory notes and such notes have been sued upon before a civil Court, the Tahsildar cannot grant a certificate of discharge especially when there is no specific provision like sections 5 and 6 enabling the Tahsildar to grant a certificate of discharge in respect of money claims. No doubt, section 4 imposes a bar on the civil Court not to entertain a suit or a new proceeding against a debtor for recovery of such a debt; and also provides for abatement of the suits pending at the commencement of the Act. But, for considering the question as to the maintainability of the suit or for considering the question of abatement of the suit, the question whether the defendant is a "debtor" as defined in the Act has to be gone into as a jurisdictional issue. Therefore, once the claim has been made before the civil Court, it has to decide whether the party sued upon is a "debtor" as defined in the Act and entitled to its benefits before disposing of the suit. The orders of both the authorities below in the instant case have to be set aside on the ground that they have no jurisdiction. [*Para.* 3.]

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*W.P. No. 10434 of 1981.
2nd February, 1982.

Case referred to:—

Perumal v. *Chinna Kuppanna Gounder*, (1981) 2 M.L.J. 1.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to D.R.A.P. No. 46 of 1981 on the file of the Appellate Authority (Sub-Collector), Kumbakonam and quash the order, dated 25th July, 1981.

K. Raman, for Petitioner.

S. Jagadeesan, for Government Pleader, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The petitioner herein is a creditor who has lent a total sum of Rs. 3,115 to the third respondent on four occasions on promissory notes. He filed a suit in O.S. No. 426 of 1980 on the file of the District Munsif, Valangaiman to enforce the claims under the promissory notes. While the said suit is pending, the third respondent, defendant in the suit, filed an application before the Special Tahsildar, Kumbakonam, seeking a certificate of discharge of the debt which is the subject-matter of the said suit, O.S. No. 426 of 1980. The said application was resisted by the petitioner on the ground that the third respondent is not entitled to the benefits of the Act. The Tahsildar, however held, that the gross annual household income of the third respondent being less than Rs. 4,800, he is entitled to the benefits of the Act. The said order has been confirmed on appeal by the Sub-Collector, Kumbakonam.

2. Both the orders of the Tahsildar and the Sub-Collector have been challenged in this writ petition by the creditor on the ground that the authorities below have no jurisdiction to grant a certificate of discharge in respect of mere money claims, when the power to grant a certificate of discharge by the authorities constituted under the Act extends only to the case of pledge or mortgage and not in respect of mere money claims. Learned counsel for the petitioner relies on the decision of Ratnam, J., in *Perumal* v. *Chinna Kuppanna Goundar*[1], wherein the learned Judge has held that the jurisdiction of the Tahsildar to grant a certificate of discharge under section 5 or 6 cannot be invoked in respect of a debt due under a promissory note.

3. On the facts of this case we are inclined to agree with the submission of the learned counsel for the petitioner. In this case, the debt arises under promissory notes and the promissory notes have been sued upon before a civil Court. The Tahsildar cannot grant a certificate of discharge especially when there is no specific provision like section 5 or 6 enabling the Tahsildar to grant a certificate of discharge in respect of money claims. No doubt, section 4 imposes a bar on the civil Court not to entertain a suit or other proceedings against a debtor for the recovery of such a debt. It also provides for abatement of the suits pending at the commencement of the Act. But, for considering the question as to the maintainability of the suit or for considering the question of abatement of the suit, the question whether the defendant is a debtor as defined in the Act has to be gone into as a jurisdictional issue. Therefore, once the claim has been made before the civil Court, it is the civil Court which has to decide as to whether the party sued upon is a debtor as defined in the Act. Therefore, we are of the view that once the matter has gone before the civil Court, it is the civil Court which has to decide the question as to whether the defendant in the suit is a debtor entitled to the benefits of the Act before disposing of the suit. In this view of the matter, we have to set aside the orders of both the authorities below on the ground that they have no jurisdiction. The writ petition is therefore allowed and the orders of both the authorities are quashed. Liberty is however given to the third respondent to file an application before the Court in which the suit is pending for deciding the question as to whether he is entitled to the benefits of the Act or not. There will be no order as to costs.

R.S. —— *Petition allowed.*

1. (1981) 2 M.L.J. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and T. N. Singaravelu, JJ.*

M|s. Buhari Trading Company represented by its Proprietrix Mrs. Hyrunnissa Beevi .. *Appellant**

v.

M|s. Star Metal Company represented by its Managing partner A. S. M. Mohammed Jumid .. *Respondent.*

and

M|s. Star Metal Company, represented by its Managing Partner A. S. M. Mohammed Jumaid .. *Plaintiff*

v.

M|s. Buhari Trading Company, represented by its Proprietrix Mrs. Hyrunnissa Beevi .. *Defendant.*

Partnership Act (IX of 1932), section 69—Civil Procedure Code (V of 1908), Order 23, rule 1—Suit filed by unregistered firm under Admiralty jurisdiction in respect of a ship—Suit withdrawn without taking permission to file fresh suit—Firm got registered — Fresh suit filed on the same cause of action—Held no permission from Court necessary—Dismissal of earlier suit not a bar to filing of fresh suit by the registered firm—Concerned ship not a foreign ship — Suit under Admiralty jurisdiction not competent — Permission sought to treat suit as one under ordinary original jurisdiction — Permission, if can be given.

The dismissal of a suit when it was sought to be withdrawn on the ground that the plaintiff therein was an unregistered firm, does not bar the filing of a fresh suit on the same cause of action after the firm gets itself registered and for doing so no permission is needed. [*Para.* 5.]

Since the ship which is the subject-matter of the suit was not a foreign ship and was in fact a wreck in debris lying in part within the jurisdiction of the High Court the plaintiff's claim could be considered only under the ordinary original jurisdiction and the suit could not have been filed under the Admiralty jurisdiction of the High Court. However where all the requirements to entertain the suit are common to both jurisdictions and are in fact satisfied it will be doing injustice to dismiss the suit because the party quoted on a misunderstanding of the law a wrong jurisdiction. It would be only hyper-technical to return the plaint for presenting on the Original Side of the High Court and not under the Admiralty jurisdiction. The fact that even after the suit is taken as one filed under the original jurisdiction some of the reliefs asked for could not fit it is a matter to be considered by the lower Court when giving relief to the plaintiff after the trial of the suit. But, at this stage, treating the suit as one filed under the original jurisdiction could in no way be said to have prejudiced the defendant in his defence. [*Paras.* 7 *and* 8.]

Cases referred to:—

Jalal Mohd. v. *Kakka Mohd.*, (1971) 84 L. W. 654: A. I. R. 1972 Mad. 86; In re *Arunagiri Mudaliar*, A.I.R. 1936 Mad. 697; (*Firm*) *Sonlal Hansraj* v. *Sadashiv Dasaras*, A.I.R. 1937 Nag. 146; *Firm Kishen Lal Ram* v. *Abdul Ghafur Khan*, A.I.R. 1935 Lah. 893; *Maung Tha Nye and Co.* v. *Ma Un Ma Pru*, A.I.R. 1929 Rang. 260; *Mohan Singh* v. *Janki Dass*, A.I.R. 1937 Lah. 241; *Malhotra and Company* v. *Ramesh Mistri*, A. I. R. 1971 P. & H. 212.

Appeal under clause 15 of the Letters Patent and under Order 36, rule 1 of the O. S. Rules against the decree of the Mr. Justice Shanmukham, dated 11th January, 1982, and passed in the exercise of the ordinary original civil jurisdiction in C.S. No. 565 of 1981.

C. Daniel, for Appellant.

S. C. Sivaji, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This is an appeal against the order of the learned Judge Shanmugam, J., trying the following two issues as preliminary issues and giving a finding thereon:—

(1) Is the suit not maintainable in view of the dismissal of C.S. No. 548 of 1981?

*O.S. Appeal No. 7 of 1982. *4th March,* 1982.

(2) Is the suit liable to be dismissed as the cause of action does not arise under the Admiralty jurisdiction of this Court?

On the first issue, the learned Judge held against the defendant and found that the suit is maintainable. On the second issue, though the learned Judge agreed with the defendant that the cause of action does not arise under the Admiralty jurisdiction of this Court, treated the suit as one filed under the Ordinary Original Jurisdiction of this Court and in that view the suit was held not liable to be dismissed. It is against this finding that the defendant has preferred this appeal.

2. Before dealing with the arguments in the appeal, it is necessary to set out certain facts. The plaintiff is a firm of partnership registered under the Partnership Act. It was so registered on 30th November, 1981. Prior to its registration, as an unregistered firm, C.S. No. 548 of 1981 was filed on 24th November, 1981, invoking the Admiralty jurisdiction of this Court. Along with the suit, Application No. 4062 of 1981 was filed praying for an order of arrest of the vessel Sir Godfrey Armstrong in the Port of Madras. Time for filing counter-affidavit was taken by the defendant on 25th November, 1981, and the case was adjourned for such filing of counter to 27th November, 1981. On that day, a counter was filed. However, the case was not taken up, but was further adjourned at the request of the counsel for the plaintiff, who appeared to have represented that he wished to withdraw the suit. Subsequently, on 30th November, 1981, the counsel for the plaintiff in C.S. No. 548 of 1981 made the following endorsement on the plaint:

> "The suit is not pressed. The suit may be dismissed and half court-fee may kindly be ordered to be refunded."

On that, the learned Judge made the following order:—

> "The learned counsel for the plaintiff has endorsed on the plaint that he is not pressing the suit. Hence dismissed. Mr. U. N. R. Rao, the learned counsel for the defendant presses for his cost. But I am not inclined to accede to his request, because he has not filed his written statement and he entered appearance because of Application No. 4062 of 1981."

After the withdrawal of the suit, on the same day, the plaintiff respondent herein presented the present suit after the firm was registered under the Partnership Act. Along with the plaint, again the plaintiff filed Application No. 4126 of 1981 praying for an order of arrest of the said vessel. A counter-affidavit had been filed in which it was contended that consequent on the withdrawal of the prior suit, the plaintiff is precluded from filing the second suit on the same subject-matter. In reply to this counter-affidavit, the plaintiff stated the circumstances under which he withdrew the earlier suit. It was stated that at the time when the previous suit was filed the firm was not registered and on the assumption that a registration under the Income-tax Act would be sufficient for filing a suit by the firm, the earlier suit was filed, but coming to know that the registration under the Income-tax Act was not sufficient to sue in the name of the firm, the plaintiff applied for registration of the firm under the Indian Partnership Act on 28th November, 1981, and it was registered on 30th November, 1981, and therefore, the earlier suit C.S. No. 548 of 1981 was withdrawn. It was further contended that the unregistered firm is in law a non-entity and that, therefore, the filing of the earlier suit or the withdrawal of the same did not bar the filing of the second suit. We are mentioning these facts in order to show what the parties understood by the words 'not pressed' and why the earlier suit was withdrawn. A written statement was filed by the defendant in which again a plea that the plaintiff had abandoned the earlier suit and since no permission was given to the plaintiff to file a fresh suit, a second suit was barred under Order 23, rule 1, Civil Procedure Code. On this pleading two issues, as stated above, were raised and dealt with as preliminary issues by the learned Judge. The learned Judge held that the suit filed by the unregistered firm was *non est* in the eye of law and therefore on 24th November, 1981, when the earlier suit was instituted, the present plaintiff was not in existence and that therefore there could be no room for the contention that C.S. No. 548 of 1981 was instituted by the present plaintiff. The learned Judge further observed that if the present plaintiff has not instituted the former suit, then it is obvious that Order 23, rule 1, Civil Procedure Code, shall not remain

an obstacle in the way of the present plaintiff maintaining the present action. The learned counsel for the appellant strenuously contended that the view of the learned Judge that the unregistered firm was a non-entity and it could be considered as born only on registration under the Partnership Act, is legally not correct. According to the learned counsel, the firm was as much alive prior to the registration as it was after, but there was only a disability against filing a suit by an unregistered firm and that therefore it is not correct to state that the present plaintiff had not instituted the former suit. The learned counsel for the appellant also relied on a Division Bench Judgment of this Court reported in *Jalal Mohd.* v. *Kakka Mohd.*[1], to which one of us was a party, wherein it was held that if a decree had been made in a suit filed by an unregistered firm without a plea of bar under section 69 of the Partnership Act, the decree is valid and binding and not a nullity and if that is so, in this case also when the suit was not pressed and dismissed when there was no plea at the time when the suit was withdrawn that the suit is barred under section 69, the dismissal in effect amounts to a decree by this Court dismissing the suit and that decree should be deemed to be valid and binding. On the other hand, the learned counsel for the respondent-plaintiff contended that the earlier suit was withdrawn because the firm was not registered and in a number of decisions it has been held that an unregistered firm cannot file a suit for enforcing a contract under section 69 and realising that position the suit was withdrawn and a new suit was filed after it was registered. In the circumstances, according to the learned counsel, filing of the earlier suit is not a bar for the presentation of the second suit.

3. Before we deal with the rival contentions of law, we will clear one doubt as to whether the earlier suit was withdrawn on the ground that it was one filed by an unregistered firm and may not be maintainable. We have already noticed that the earlier suit was filed on 24th November, 1981, by the plaintiff as an unregistered firm. Later, only after the counter-affidavit was filed in the application for interim orders, the plaintiff appears to have applied for registration on 28th November, 1981, and the firm was registered on 30th November, 1981. After he got the registration, he withdraw the earlier suit and filed a fresh suit on the same day. That the suit was filed on the same day is a very relevant consideration. Again, when the present suit was filed, the office returned the papers asking as to how the present suit is maintainable in view of the filing of the earlier suit. While re-presenting, the learned counsel raised the plea that the earlier suit was one filed by an unregistered firm and was therefore not maintainable and in those circumstances, he withdraw the earlier suit and filed the present suit and that therefore the suit is maintainable. It may be mentioned that this was even before the written statement was filed. As already stated, in the counter-affidavit filed in the interim application in Application No. 4126 of 1981, the defendant raised the plea of bar of suit by reason of the withdrawal of the earlier suit. In reply to the same, the plaintiff contended that he withdraw the earlier suit because it was considered that a suit by an unregistered firm was not maintainable and in fact, according to the plaintiff, the old firm had no legal entity and it shall be deemed to have been born only when it was registered under the Partnership Act. In those circumstances, there could be no doubt that the plaintiff in this case withdraw the earlier suit because of the possible objection that the suit was not maintainable by an unregistered firm. That is how the learned Judge also proceeded in considering the first issue and accordingly we have to proceed also on that basis and not as if the earlier suit was not pressed and therefore was dismissed. Under Order 23, rule 1, Civil Procedure Code, the plaintiff is entitled, at any stage of the suit, to abandon his suit or abandon a part of his claim for which purpose an application may be filed. If the Court is satisfied that the suit must fail for some formal defect or that there was sufficient ground for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of

1. (1971) 84 L. W. 654: A.I.R. 1972 Mad. 86.

such suit or such part of a claim. If the plaintiff withdraws without such permission of the Court to file a fresh suit, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. In this case, no leave has been prayed for by the plaintiff for instituting a fresh suit and, therefore, the question for consideration is, whether the plaintiff shall be deemed to have preferred an earlier suit and withdrawn which will preclude him from instituting a fresh suit in respect of the same subject-matter or such part of the claim. A similar question has come up for consideration before Courts in different form. In In re, *Arunagiri Mudaliar*[1], while considering a revision petition against the permission granted by the Court below to an unregistered firm to file a fresh suit subsequently after registration, the learned Judge observed, the withdrawal of a suit by partners who have not been registered as a firm is no bar to a suit filed on the same cause of action by the same persons when and if they got themselves registered as a firm under the Partnership Act. For the latter suit would be technically by a different plaintiff. The learned Judge further observed:—

> "I do not see any reason why the unqualified dismissal of a suit filed by a number of persons because they are a firm and are not registered under the Partnership Act, should be any bar to the institution of a suit on the same cause of action by the same persons when they have got themselves registered."

With these observations, the learned Judge dismissed the revision petition on the ground that even if no such permission to file a fresh suit is granted, the plaintiff would be entitled to file a fresh suit and that, therefore, by the Court below giving such permission, it could not be said that the Court had acted without jurisdiction or in excess of jurisdiction. In (*Firm*) *Sonlal Hansraj* v. *Sadashiv Dasaras*[2], the prior suit was dismissed under section 69 (2) of the Partnership Act, on the ground that the firm was unregistered. The firm was then registered and the second suit was brought on the same cause of action. After noting the position in England and also the other provisions, it was held that the former suit could not be said to have been heard and determined in order to say that the subject-matter of the subsequent suit must not be heard or determined. Section 69 of the Partnership Act prevented the institution of a suit, and that therefore there was no determiation of the subject-matter of the previous suit and hence the second suit was maintainable, and not barred by any principles of *res judicata* or estoppel. In this judgment, two earlier decisions in *Firm Kishen Lal Ram* v. *Abdul Ghafur Khan*[1] and *Maung Tha Nye and Company* v. *Ma Un Ma Pru*[2], were also considered in which it was held that the second suit would lie, though the decision on that point was not necessary in those cases. Though in that view they are obiter, since the opinion was correct, it was accepted by the learned Judge in the Nagpur case.

4. In the decision reported in *Mohan Singh* v. *Janki Dass*[3], the suit by an unregistered firm was dismissed on the ground that section 69 is a bar. The unregistered firm thereafter assigned its claim to a registered firm. A suit was filed by the registered firm and it was held that it was maintainable. This was in the view that the unregistered firm, which assigned the claim, could have itself maintained another suit for recovery of the suit claim after its registration and if it could maintain another suit, the assignee from the unregistered firm also could maintain a suit and the dismissal of the previous suit would not operate as a bar.

5. The decision in *Malhotra and Company* v. *Ramesh Mistri*[4], is an interesting case. In that case, the suit filed by an unregistered firm was sought to be withdrawn and permission for filing a fresh suit was also prayed for, under Order 23, rule 1, Civil Procedure Code. But the permission to file a fresh suit was not granted and the suit was dismissed as withdrawn. In the revision petition filed against

1. A.I.R. 1936 Mad. 697.
2. A.I.R. 1937 Nag. 146.

1. A.I.R. 1935 Lah. 893.
2. A.I.R. 1929 Rang. 260.
3. A.I.R. 1937 Lah. 241.
4. A.I.R. 1971 Punj. & Har. 212.

that order, the learned Judge held that since the plaintiff wanted to withdraw the suit, the proper order to pass was to dismiss the suit and not to pass the order impugned. While so holding, the learned Judge further observed:—

> "In fact, no suit by an unregistered firm is competent and the only course open to the Court was to dismiss the suit. It could not withhold the permission so far as the plaintiff is concerned debarring him from filing a fresh suit."

The earlier decisions, which we have noted above, were also noted by the learned Judge. It may be seen that in all these cases, the latter suit was held not barred though for different reasons. In some cases, the suit was held not barred on the ground that the plaintiff itself was incompetent to file the suit and therefore there is no question of the Court granting permission to the plaintiff to file a fresh suit and in such circumstances, the Court can only dismiss the suit and could not consider even the claim for filing a fresh suit. The other reason, found in some of these cases is that the unregistered firm and the registered firm are technically different persons and therefore even an unqualified dismissal of the suit filed by the unregistered firm could not be considered as a bar for the institution of a fresh suit on the same cause of action. The third line of reasoning was that when the earlier suit was dismissed on the ground that the suit is barred under section 69 (2) of the Partnership Act, there was no determination of the cause of action or the subject-matter of the suit and there was no adjudication finally or otherwise and, therefore, the earlier order could not be considered either as estoppel or as *res judicata* and the subsequent suit is maintainable. Of course, this argument is to be restricted to a plea of estoppel or *res judicata* and may not be applicable when we consider the specific rule in Order 23, rule 4, Civil Procedure Code But suffice it to say that the dismissal of a suit when it was sought to be withdrawn on the ground that the plaintiff therein was unregistered firm, does not bar the filing of a fresh suit on the same cause of action after the firm gets itself registered and for doing so no permission is needed.

6. The decision is *Jalal Mohd.* v. *Kakka Mohd.*[1], is not applicable to the facts of the present case. In that case, a suit was filed by an unregistered firm against another firm in which there was a common partner. In the earlier suit, no plea was raised under section 69 of the Partnership Act. After the decree was made, a fresh suit was filed by the common partner for a declaration that the decree obtained in the earlier suit was void as far as he was concerned on the ground that the said decree had been obtained by fraud and suppression of the unregistered partnership agreement between the defendants. This Court held that the earlier decree was not void and could be set aside on two main grounds. Firstly, in the earlier suit, the plaintiff who was a defendant there, did not raise the plea that the suit was barred and, therefore, he was estopped from raising that plea in a separate suit. Secondly, the decree passed in a suit instituted by an unregistered firm is not a nullity and the disability created by section 69 of the Partnership Act is with regard to the power of the Court to pass a decree. It may also be mentioned that the earlier suit was filed as a proprietary concern and not as a partnership. The ratio of that judgment is, therefore, not in any way, against the view expressed in all these judgments which we have noted above. For the foregoing reasons, we agree with the learned Judge that the suit is not barred by the dismissal of C.S. No. 548 of 1981.

7. The next ground raised by the learned counsel for the appellant is that the suit could not have been filed under the Admiralty jurisdiction of this Court. The learned Judge held that the suit could not have been filed under the Admiralty jurisdiction, as the ship, which is the subject-matter, is not a foreign ship and in fact, it was a wreck in debris lying in port within the jurisdiction of this Court and the claim by the plaintiff could be considered only under the Ordinary Original Jurisdiction. Even so, the learned Judge held that since this Court has both civil as also the Admiralty jurisdiction, justice required that it is for the Court to exercise such jurisdic-

1. (1971) 84 L. W. 654: A. I. R. 1972 Mad. 86.

tion as the facts and circumstances justified, and not to be carried away by what is quoted as the provision of law under which the suit was filed. The leraned Judge was of the view that when all the requirements to entertain the suit are common to both the jurisdictions and are in fact satisfied, it will be doing a great injustice to dismiss the proceedings, because the party quoted on a understanding of the law a wrong jurisdiction of the Court. We are in entire agreement with this view of the learned Judge for more than one reason. Even if the suit could not have been maintained under the Admiralty jurisdiction, the plaint could have been only returned to the plantiff for proper presentation before the proper forum, in which case, the plaintiff need have to amend only the provision of law, namely, the statement regarding the Admiralty jurisdiction alone has to be amended, and the plaint could have been re-presented under the original jurisdiction. It is also not the case of the defendant that on the date when this point was decided or when the suit was taken as one filed under the original jurisdiction, the claim in the suit barred by limitation.

8. In such circumstances, it would be only hyper technical to ask the Court to return the plaint to the plaintiff for presenting it on the original side of this Court and not under the Admiralty jurisdiction. It is true that even after the suit is taken as one filed under the original jurisdiction, some of the reliefs asked for could not fit it. For instance, in the plaint, one of the prayers was that the Court should be pleased to order arrest of the vessel "Sir Goldfrey Armstrong" the dredger lying in the Madras Port. We normally use the words "ordering arrest of the vessel" only in Admiralty jurisdiction. That will have to be considered by the Court below when giving the relief to the plaintiff after the trial of the suit. But, at this stage, treating the suit as one filed under the original jurisdiction could in no way be said to have prejudiced the defendant in his defence. In the circumstances, therefore, we are of the view that the learned Judge was right in treating the suit as one filed under the Ordinary Original Jurisdiction of this Court, though the cause title mentioned Admiralty jurisdiction.

9. The learned counsel for the appellant contended that this conversion or treating the suit as one under the Ordinary Original Jurisdiction could be only in exercise of the inherent jurisdiction of this Court and such inherent jurisdiction is normally exercised to meet the ends of justice or to prevent the abuse of process of Court and in this case such a conversion could not be stated to be to advance the ends of justice. We are unable to agree with this contention. There could be no precise definition as to what is meant by ends of justice; but it is a well understood expression. It depends on the facts and circumstances of each case. The learned Judge had exercised his jurisdiction and we could not say that there was any arbitrary exercise of power in treating the suit as one filed under the ordinary original jurisdiction. For the foregoing reasons, the appeal fails and it is dismissed. But, there will be no order as to costs.

10. Under Article 134-A of the Constitution, the learned counsel for the appellants seeks leave to appeal to the Supreme Court. We consider that no substantial question of law of general importance which need to be decided by the Supreme Court arises out of our order. Accordingly, we decline to grant the leave.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Krishnan Servai

.. *Appellant**

v.

Arulmighu Kaliamman Temple, Vatlagundu, represented by S. Thangapandian as fit person, cause title amended as per order of Court, dated 9th March, 1979 in C.M.P. No. 2882 of 1979

.. *Respondent.*

Transfer of Property Act (IV of 1882), section 106—Tenant agreeing on 18th July, 1975 in Exhibit A-6 to vacate by 1st August, 1975 —Tenant not vacating by 1st August, 1975 but asking for further time—Plaintiff-landlord not agreeing—Issue of notice, dated 11th August, 1975 by landlord asking tenant to deliver possession by 17th August, 1975—Tenant alleging notice to be not in accordance with section 106 of the Transfer of Property Act — Held Exhibit A-6 was a contract to the contrary.

The tenant, on 18th July, 1975, in the account books of the landlord, Exhibit A-6, agreed to vacate the suit property by 1st August, 1975. However, the tenant did not vacate and wanted further time. The landlord did not agree to this. On 11th August, 1975, the landlord issued Exhibit A-3, a notice calling upon the tenant to deliver possession by 17th August, 1975. Thereafter the landlord filed the suit against the tenant for possession and damages. The tenant claimed that the notice of termination of tenancy was not in accordance with section 106 of the Transfer of Property Act. The trial Court dismissed the suit. On appeal by the landlord the lower appellate Court held that Exhibit A-6 itself would amount to termination of the tenancy and allowed the appeal. On second appeal by the tenant,

Held: The defendant, under Exhibit A-6 agreed to vacate by 1st August, 1975, and it would amount to a contract to the contrary and thereafter it was not open to the defendant to insist on a further notice of termination in accordance with the terms of section 106 of the Transfer of Property Act. [*Paras.* 2 *and* 5.]

After Exhibit A-6, the relationship of landlord and tenant came to an end and the correspondence that followed thereafter was only with the view to secure the eviction of the tenant who continued to be in occupation in spite of his undertaking to vacate by 1st August, 1975. [*Para.* 6.]

Cases referred to:—

Ram Kumar v. *Jagadish Chandra*, 1951 S.C.J. 813: 1952 S.C.R. 269: 65 L.W. 219: A.I.R. 1952 S.C. 23; *Batoomal* v. *Rameshwar Nath*, 1970 R.C.J. 635: A.I.R. 1971 Delhi 98.

Appeal against the decree of the Court of the Additional Subordinate Judge, Dindigul in Appeal Suit No. 176 of 1971 preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 38 of 1976.

B. S. Gnana Desikan, for Appellant.

The Court delivered the following

JUDGMENT.—The defendant in O.S. No. 38 of 1976 on the file of the District Munsif of Dindigul is the appellant in this second appeal. The respondent herein is the plaintiff in the suit. The plaintiff laid the suit for recovery of possession and for damages from 1st August, 1975. There is no dispute that the defendant was a tenant of the suit property. There is no document of lease exhibited in the case. Admittedly, the tenancy was not either for agricultural or for manufacturing purposes. Normally, in such a case, the tenancy will have to be determined by fifteen days' notice expiring with the end of month of the tenancy. In the instant case, what happened is, the defendant on 18th July, 1975, in the account books of the plaintiff, in unequivocal terms, agreed to vacate the suit property by 1st July, 1975. He did not adhere to this promise but wanted a further extension of fifteen days' time under Exhibit A-2, dated 2nd August, 1975. Obviously, this was not acceptable to the plaintiff and the plaintiff issued a notice on 11th August, 1975, under the original of Exhibit A-3, calling upon the defendant to deliver possession by 17th August, 1975. The main question that arose on the

*S.A. No. 1861 of 1978.

27th September, 1982.

contest by the defendant in the litigation was as to whether there should have been a further termination of tenancy within the meaning of section 106 of the Transfer of Property Act (IV of 1882), hereinafter referred to as 'the Act'. It is true that, the first Court held that there was no termination of tenancy as contemplated under section 106 of the Act and in this view dismissed the suit of the plaintiff for recovery of possession and granted a decree in favour of the plaintiff for a sum of Rs. 1,585 towards arrears of rent till the end of 15th December, 1975. The plaintiff appealed and the lower appellate Court took the view that Exhibit A-6 itself would amount to termination of tenancy, hence chose to reverse the judgment and decree of the first Court, allowed the appeal and awarded damages at the rate of Rs. 75 per month to the plaintiff from 1st August, 1975, with proportionate costs. Hence this second appeal.

2. At the time of the admission of this second appeal, the following substantial questions of law were mooted out for consideration:

"(*i*) Whether the undertaking to vacate the shop by the lessee under Exhibit A-6 is a notice as contemplated under section 106 of the Transfer of Property Act;

(*ii*) Whether the Court below is correct in construing Exhibit A-6 as a notice when the same stands waived by the subsequent notice Exhibit A-3 given by the plaintiff;

(*iii*) Whether the lower appellate Court erred in granting the decree for damages for use and occupation from 1st August, 1975, when the plaintiff himself admitted that he has permitted the appellant to occupy the building up to 15th August, 1975, as per the request of the plaintiff under Exhibit A-2."

3. Mr. B. S. Gnanadesikan, learned counsel for the appellant, would submit that Exhibit A-6 could not satisfy the provisions of section 106 of the Act with reference to termination of tenancy and the lower appellate Court erred in counting Exhibit A-6 as amounting to termination of tenancy. I am not able to appreciate and accept this submission of the learned counsel for the appellant for the simple reason that under Exhibit A-6, the defendant has agreed to vacate and deliver possession of the suit property to the plaintiff by 1st August, 1975. This would amount to a contract to the contrary as contemplated in section 106 of the Act. The relationship of landlord and tenant comes into existence on account of a contract between the parties and it is governed by the terms and conditions agreed to between the parties. The very set of expressions "In the absence of a contract .... to the contrary" occurring in section 106 of the Act, makes it clear that primarily the contract between the parties should fix and lay down the terms with reference to the tenure of the lease and of the formalities of termination of such lease. But if the contract is silent on these questions, then the statutory presumption arises and the obligation to terminate the tenancy in accordance with section 106 of the Act will become operative. It is by now well-settled that the contract to the contrary need not necessarily be express but can also be implied, vide *Ram Kumar* v. *Jagdish Chandra*[1]. There is no qualification that the contract to the contrary must either be anterior to or contemporaneous with the contract of lease. It would also be a matter of subsequent bargain and the parties may enter into a contract to the contrary either at the time of entering into a lease or such a contract to the contrary can also be struck even subsequently. The parties would also be enabled by subsequent contract to vary the terms agreed to earlier.

4. A similar question came up for consideration in *Batoo Mal* v. *Rameshwar Nath*[2], before a Division Bench and that Division Bench took the view that waiver is of a right; parties may enter into a contract to the contrary at the time of entering into a lease; since the lease itself is based on a contract, the parties may agree to vary its terms by a subsequent contract; one of the parties may even agree to abandon a right given to it by section 106 in the absence of a contract to the contrary; and if the requirement of notice can thus be waived by an agreement between the parties, it would be reasonable to think that it could also be waived by such conduct as would be the evi-

1. 1951 S.C.J. 813: 1952 S.C.R. 269: 65 L.W. 219: A.I.R. 1952 S.C. 23.
2. 1970 R.C.J. 635: A.I.R. 1971 Delhi 98.

dence of the intention of the parties. In my view, this appears to be the reasonable and the practical construction that could be put on section 106 of the Act with reference to the contract to the contrary contemplated therein.

5. In the instant case, the defendant, under Exhibit A-6, agreed to vacate by 1st August, 1976, and it would amount to a contract to the contrary and thereafter it is not open to the defendant to insist on a further notice of termination in accordance with the terms of section 106 of the Act. One other point which the learned counsel for the appellant urges is that subsequent to Exhibit A-6, the plaintiff issued Exhibit A-3 and that must be taken to be the notice of termination and since it is not in accordance with section 106 of the Act that factor should be put against the plaintiff's action for eviction against the defendant. In my view, this is a factual misconception. Exhibit A-3 is only pursuant to Exhibit A-6 and the defendant was called upon to implement and adhere to his undertaking expressed in Exhibit A-6 and Exhibit A-3 cannot be construed as an independent notice of termination. In my view, by Exhibit A-6, the defendant had agreed to vacate, waiving his right to have a notice of termination of tenancy within the meaning of section 106 of the Act and that would suffice for the purpose to enable the plaintiff to pursue the cause for evicting the defendant, the tenant.

6. The third and the last aspect which the learned counsel for the appellant urged is that it was not competent for the lower appellate Court to award damages from 1st August, 1975, because by Exhibit A-3 the defendant was called upon the vacate only by 17th August, 1975. Here again, the factual aspect does not support this submission of the learned counsel for the appellant. After Exhibit A-6 the relationship of landlord and tenant came to an end and correspondence that followed thereafter were only with a view to secure the eviction of the tenant who continued to be in occupation in spite of his undertaking to vacate by 1st August, 1975. Hence the position will not stand altered and the liability of the defendant to compensate the plaintiff by way of damaged from 1st August, 1975, will subsist and cannot be avoided.

7. For all these reasons, I am not able to interfere in second appeal and accordingly this second appeal fails and the same is dismissed. There will be no order as to costs. The defendant will have three months from today to vacate the suit property.

S.J ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Padmanabhan, J.*

T. S Pichaiya, Tuticorin .. *Petitioner**

v.

The Rent Controller, Tuticorin and another .. *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960), *(as amended by Act XXIII of* 1973), *section* 18—*Powers of the Rent Controller to order restitution.*

(B) *Civil Procedure Code (V of* 1908), *sections* 144 *and* 151—*Applicability to Rent Control Proceedings.*

The petitioner was the owner of the premises bearing door No. 479, V. E. Road, Tuticorin, he having purchased it. At the time of purchase the second respondent was a tenant of the premises on a monthly rent of Rs. 90. The second respondent attorned the tenancy in favour of the petitioner. The petitioner filed a petition for eviction of the respondent under section 10 (2) (*c*) and 10 (3) (*c*) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. The tenant did not appear and was set *ex parte* and an eviction order was passed. The petitioner filed a petition for execution of the order of eviction. The property was delivered to the petitioner through Court. The tenant filed an application under section 12 (3) of the Tamil Nadu Buildings (Lease and Rent Control) Rules to set aside the *ex parte* order and the *ex parte* order was

*W.P. No. 11636 of 1981. *20th July,* 1982.

set aside. The petitioner-landlord filed an appeal to the Appellate Authority. The tenant during the pendency of the appeal filed a petition for redelivery of the property under sections 144 and 151, Civil Procedure Code. The Rent Controller ordered redelivery. The present writ petition was filed to set aside the order of the Rent Controller.

Held, that an application for restitution is an application for execution and consequently the Rent Controller has got the power to order restitution. If once in exercise of his powers the Rent Controller finds that possession has been delivered on the basis of an order of eviction which has been subsequently set aside, certainly he has the power to order redelivery. Section 18 itself creates a fiction that every order passed by the Rent Controller shall be executed as if it were an order of a civil Court and that for that purpose he has all the powers of a civil Court. The application for restitution is only an application for execution. [*Paras.* 4 *and* 7.]

The right to restitution is not derived from section 144, Civil Procedure Code. The lower Court had the power to order restitution under its inherent powers and direct redelivery under section 144 of the Code. The same conclusion can be arrived at on the basis of another principle of law as well, *viz, actus curiae neminem gravabit*—an act of Court shall prejudice no man. In other words, the Court will not allow a suitor to suffer by reason of a wrong order and the moment the mistake is discovered it will rectify the error and put him so far as possible in the position he would have occupied had the wrong order not been passed. The contention that the Rent Controller after the amendment of the Act in 1973 had no powers to order restitution and effect redelivery of the property notwithstanding the fact that the order of eviction had been set aside subsequently cannot be accepted. To hold otherwise would be to set a premium on fraud and it would also be possible for a landlord to get *ex parte* orders of eviction behind the tenant's back and obtain possession and the tenant would find himself in a helpless situation. [*Para.* 8.]

Cases referred to:—

Thangaswamy Chettiar v. *Bapoo Sahib,* (1949) 2 M.L.J. 699: 62 L.W. 876; *Somasundaram* v. *Chokkalingam,* (1917) I.L.R. 40 Mad. 780: 5 L.W. 267: 38 I.C. 806; *Unnamalai Ammal* v. *Mathan,* (1917) 33 M.L.J. 413. 6 L.W. 359: 42 I.C. 530; *Palaniyandi Pillai* v. *Rasappa Pillai,* (1937) 2 M.L.J. 108: 45 L.W. 522: A.I.R. 1937 Mad. 173; *Arunagiri Nadar* v. *Rathinasami,* (1970) 83 L.W. 745: (1971) 1 M.L.J. 220: A.I.R. 1971 Mad. 162; *Md. Hussain* v. *Pitchai,* (1970) 2 M.L.J. 663; *Mayilsami Gounder* v. *Rammoorthi Chettiar,* (1970) 1 M.L.J. 606; *Commissioner of Income-tax* v. *Amarchand,* (1963) 1 S.C.J. 411: 48 I.T.R. 159: A.I.R. 1963 S.C. 1448; *Ramaswamy Iyer* v. *Ramakrishnayya,* (1969) 2 M.L.J. 272; *Ramanujam Naidu* v. *Panchanatha Mudaliar,* (1980) 93 L.W. 136; *Subramani Pillai* v. *Rajakanni Nadar,* (1971) 1 M.L.J. 223: 83 L.W. 758: A.I.R. 1971 Mad. 310; *Commissioner of Income-tax* v. *Shakuntala,* (1962) 2 S.C.R. 871; *Birendra Nath Basu Thakur* v. *Surendra Kumar Basu Thakur,* I.L.R. (1940) 1 Cal. 486: A.I.R. 1940 Cal. 260; *Rodger* v. *The Comptoir D'Escomptede Paris,* (1871) L.R. 3 P.C. 465; *Jai Berhma* v. *Kedar Nath Marwari,* (1922) I.L.R. 2 Pat. 107; *Ghose Khan* v. *Rent Controller,* (1981) 2 M.L.J. 388; *Bengal Immunity Company* v. *State of Bihar,* (1955) 2 M.L.J. (S.C.) 168: 1955 S.C.J. 672: (1955) 2 S.C.R. 603: A.I.R. 1955 S.C. 661; *T. K. Sundaram* v. *V. Babraj,* (1982) T.L.N.J. 297.

K. Srinivasan, K. Raghunathan and *V. Prabhakar,* for Petitioner.

Manivannan, for Respondent.

The Court made the following

ORDER.—The petitioner is the owner of premises bearing door No. 479, V. E. Road, Tuticorin, he having purchased the property from the original owner, one Bhuvanasundari. At the time of purchase the second respondent Noble Fernando, was the tenant of the premises on a monthly rent of Rs. 90. The second respondent thereafter attorned the tenancy in favour of the petitioner. Thereafter, the petitioner filed R.C.O.P. No. 42 of 1981 for eviction of the second respondent under section 10 (2) (i) and 10 (3) (*a*) (i) of the Tamil Nadu Buildings (Lease and Rent Control) Act, before the first respondent. Since

the second respondent did not appear pursuant to the notice, so it is alleged by the petitioner, the first respondent set him *ex parte* and passed an order of eviction. The petitioner then filed E.P. No. 157 of 1981 for execution of the order of eviction. The property was delivered to the petitioner through Court on 2nd July, 1981. Subsequently, the second respondent filed an application I.A. No. 195 of 1981 under rule 12 (3) of the Tamil Nadu Buildings (Lease and Rent Control) Rules, to set aside the *ex parte* order, of eviction passed on 14th April, 1981. He contended that summons in the rent control proceedings were not served on him and that his signature was forged on the summons. The Rent Controller accepted the contention of the second respondent and set aside the *ex parte* order of eviction. Against the said order of the Rent Controller setting aside the order of eviction, the petitioner has filed C.M.A. No. 119 of 1981 before appellate authority (Principal Sub-Judge, Tuticorin) and the appeal is pending. The second respondent had in the meanwhile filed E.A. No. 588 of 1981, for redelivery of the property under sections 144 and 151 of the Civil Procedure Code. In view of the fact that the *ex parte* order of eviction had been set aside the Rent Controller ordered redelivery by his order, dated 8th December, 1981. The writ petition has been filed to set aside the said order of the Rent Controller.

2. Mr. K. Srinivasan, the learned counsel for the petitioner urged the following conditions. The order of eviction was passed under the Tamil Nadu Buildings, (Lease and Rent Control) Act (XVIII of 1960)), as amended by Act XXIII of 1973. Section 18 of the Act as amended dealt with execution of orders. Section 18 (1) specifically provided that only orders under sections 10, 14, 15, 16 and 17 and every order passed on appeal under section 23 or on revision under section 25 shall be executed by the Controller, as if such order is an order of a civil Court and for this purpose the Controller shall have all the powers of a civil Court. The learned counsel made a comparative reference to section 9 of the 1949 Act, section 18 of 1960 Act, before the amendment in 1973 and also section 18 as it stood amended in 1973. The learned counsel further argued that so long as the Act does not confer a power of redelivery on the statutory authority under the provisions of the Act, the Rent Controller would have no jurisdiction to order redelivery notwithstanding the fact that the *ex parte* order of eviction had been set aside.

3. On the other hand, Mr. Manivannan, the learned counsel for the second respondent contended that the application for redelivery, which in effect is an application for restitution, was an execution application and that consequently the Rent Controller will be competent to deal with the same under section 18 (1) of the Act. The learned counsel emphasised upon the fact that every order made under sections 10, 14, 15, 16 and 17, shall be executed by the Controller as if such an order is an order of a civil Court and the Controller shall have all the powers of a civil Court. The learned counsel further urged that on the principle that no act of Court shall prejudice a party, the Rent Controller would have jurisdiction to order redelivery when it discovered that the delivery had been effected on the basis of a wrong order of eviction which had been subsequently set aside.

4. The question that arises for consideration is whether the Rent Controller has jurisdiction to order redelivery of the property to the second respondent consequent on his setting aside the order of eviction. Section 18 of the Act as amended in 1973 reads as follows:

> "18. *Execution of Orders.*—(1) Every order made under sections 10, 14, 15, 16 and 17 and every order passed on appeal under section 25 shall be executed by the Controller, as if such order is an order of a civil Court and for this purpose, the Controller shall have all the powers of a Court."

No doubt, there is some difference in language between section 18 as amended in 1973 and the corresponding provisions under the 1949 Act and the 1960 Act before its amendment. Section 9 of the 1949 Act provided that every order of eviction passed by the Rent Controller or an appellate authority should be executed by the specified Court as if it were a decree of that Court. Similarly, the 1960 Act before its amendment provided that every order made under sections 10, 12, 13, 14, 15, 16 and 17 and every order passed on appeal under section 23 or on revision under section 25 shall be executed by the specified Courts. However, after the amendment the power of exe-

-cution is conferred on the Rent Controller himself. However, he shall execute the order as if such order were an order of civil Court. For that purpose section 18 conferred on him the powers of a civil Court. Mr. Srinivasan is right in his submission that it is now settled by decisions of this Court that the Rent Controller is not a civil Court. However, I am unable to accept the contention of Mr. Srinivasan that since the Rent Controller is not a civil Court, he will not have the power to order redelivery by way of restitution. Section 18 while conferring power on the Rent Controller to execute on order, it has equally conferred on the Rent Controller all the powers of a civil Court for the purpose of execution. Section 10 provides for an order being passed for eviction of tenants. Section 14 provides for recovery of possession by the landlord for repairs and reconstruction. Section 16 deals with the right of the tenants to occupy a building if it is not demolished within the period mentioned therein. Section 17 prohibits the landlord from interfering with the amenities available to a tenant. When an order for eviction is passed under section 10 the Rent Controller is empowered under section 18 to entertain an execution petition for eviction of the tenant by the landlord. For the purpose of execution, he has got all the powers of a civil Court If once in exercise of his powers under section 18 the Rent Controller finds that delivery of possession has been ordered on the basis of an order of eviction which has subsequently been set aside, certainly he has the power to order redelivery. This is because section 18 itself creates a fiction that every order passed by the Rent Controller shall be executed as if such an order is an order of a civil Court and for that purpose the Controller is given all the powers of a civil Court. The application for restitution is only an application in execution. If the Rent Controller is terms of section 18 has got the power to entertain an execution petition he will have equally the power to order restitution. An already stated, the Rent Controller though remains a Rent Controller, in the matter of execution he executes the order as if it is an order of a civil Court and for that purpose he has all the powers of civil Court.

5. In *Thangaswamy Chettiar* v. *Bapoo-Sahib*[1], a similar question arose for consideration under sections 9 and 12 of the 1946 Act. In an application for eviction of a tenant on the ground of arrears of rent, the landlord got an order for eviction and actually got possession of the building in execution. The order of eviction passed by the Rent Controller was set aside by the appellate authority. Thereafter, the tenant filed an application for restitution and redelivery was ordered by the Subordinate Judge. Against that the landlord carried an appeal before this Court which was disposed of by a Bench of this Court. It was contended before this Court that the Subordinate Judge had no jurisdiction to order restitution and that section 144 of the Civil Procedure Code, did not apply to orders of eviction passed under the Rent Control Act. On behalf of the tenant it was contended that so far as the Province of Madras was concerned it was established that restitution proceedings were in the nature of execution proceedings, that section 8 of Madras Act XV of 1946, provided a machinery for executing orders passed in appeal, that the Court set up for that purpose in the mofussil was the Court of the Subordinate Judge or District Judge where there was no Sub-Judge and that the general rule was that once the ordinary tribunals were seized of a matter, the forms, procedure and reliefs usually observed by and obtainable in such Courts became applicable and available in respect of that matter. Balakrishna Ayyar, J., speaking for the Bench observed as follows:—

> "It is clear that the first of the three propositions on which Mr. Narayana Aiyar founded his reply is well-established in the province."

The learned Judge in support of his conclusion extracted the propositions in the following cases. In *Somasundaram* v. *Chokkalingam*[2], it was decided: "an application for restitution is an application in execution under the new Code of Civil Procedure." In *Unnamalai Ammal* v. *Mathan*[3], it was observed:

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1. (1949) 2 M.L.J. 699: 62 L.W. 876.
2. (1917) I.L.R. 40 Mad. 780: 5 L.W. 267: 38 I.C. 806.
3. (1917) 33 M.L.J. 413: 6 L.W. 349.

"An application for restitution is an application for execution of a decree and is governed by Article 182 and not by Article 181, Limitation Act. Again in *Palaniyandi Pillai* v. *Rasappa Pillai*[1], it has been observed: "It is no doubt true that our High Court has taken the view that an application for restitution in an application for execution of the decree whatever may be the view of the other High Courts."

6. A similar question arose for consideration before Ramaprasada Rao, J., in *Arunagiri Nadar* v. *Rathinasami*[2] The landlord of the building obtained an *ex parte* order of eviction against his tenant and pursuant thereto took possession of the property. In these circumstances, the learned Judge was called upon to decide whether in the absence of an express statutory provision which would enable the Court to direct restitution, it could do so *ex debtio justitiae*. The learned Judge after extracting a passage from the judgment of the Chief Justice in *Mayilsami Gounder* v. *Rammoorthi Chettiar*[3], observed thus:

"It is, therefore, clear that in the absence of an express provision or a provision by necessary intendment which would enable a civil Court to direct redelivery, the civil Court does not possess such power."

It may be mentioned that the decision relied upon by the learned Judge arose under the Madras Cultivating Tenants Protection Act, and the question that arose for decision was whether the Revenue Divisional Officer acting under section 4 (5) of the said Act had jurisdiction to order restoration in case the order of execution under which possession was taken was reversed by the appellate Court. It is significant that the decision in *Thangaswamy Chettiar* v. *Bapoo Sahib*[4], was not cited before the learned Judge.

7. An identical situation arose for decision before Ramanujam, J., in *Md. Hussain* v. *Pitchai*[5]. In this case the landlord obtained an *ex parte* order of eviction and obtained possession of the property in execution of the order. Subsequently, the *ex parte* order of eviction was set aside at the instance of the tenant. It is unnecessary to narrate the further proceedings between the landlord and tenant except to State that ultimately the tenant applied for restitution and obtained redelivery of property; the landlord carried the matter in revision before this Court. Ramanujam, J., observed as follows:

"On a due consideration of the rival contentions of the parties on the point, I am inclined to follow the decision of the Bench in *Thangaswamy Chettiar* v. *Bappo Sahib*[1]. With due respect, I cannot accept the contrary view taken by my learned brother, Ramaprasada Rao, J., in C.R.P. No. 967 of 1968 relying on the decision of the Division Bench in *Mayilsami Gounder* v. *Rammoorthi Chettiar*[2], which dealt with the power of the Revenue Divisional Officer, an authority constituted under the Madras Act XXV of 1955, to order restitution and held that he had no such power for the reason that he is bound by the provisions of the statute, that he cannot act outside the Act and that statutory Tribunals had no inherent powers to order restitution. I am not in a position to apply the principle of that decision dealing with the powers of statutory Tribunals, to the facts of the present case where the eviction order had been executed by a civil Court under the provisions of section 18 of the Madras Buildings (Lease and Rent Control) Act, which enables the civil Court to execute an order of eviction as if it were a decree passed by that Court. Once the eviction order is treated as a decree of Court and taken to a civil Court for execution as per section 18, such proceedings will be governed by the provisions of the Code of Civil Procedure, relating to execution of decrees so long as the provisions of the Rent Control Act did not modify or restrict the power of the civil Court under the Code. It is well-established that an application for restitution is treated as an application for execution. Unlike under the Madras Act XXV of 1955, the order of eviction passed under the Rent Control Act

1. (1937) 2 M.L.J. 108 at 112: 45 L. W. 522: A.I.R. 1937 Mad. 173.
2. (1971) 1 M.L.J. 220: (1970) 83 L.W. 745: A.I.R. 1971 Mad. 162.
3. (1970) 1 M.L.J. 606.
4. (1949) 2 M.L.J. 699: 62 L.W. 876:
5. (1970) 2 M.L.J. 663.

1. (1949) 2 M.L.J. 699: 62 L.W. 876.
2. (1970) 1 M.L.J. 606.

has been specifically made executable only in a civil Court and there is no provision in the Act itself curtailing or modifying its powers under the Code in matters of execution. It is because of this special feature by which an order of eviction is brought before a regular Court for execution, Ramaprasada Rao, J, had held in *Ramaswamy Iyer* v. *Ramakrishnayya*[1], that the provisions of the Limitation Act, would become applicable to the proceedings for eviction arising under the Rent Control Act. This is also the view taken by the Division Bench in *Thangaswamy Chettiar* v. *Bapoo Sahib*[2]. But I find that the said Bench Decision was not bought to the notice of Ramaprasada Rao, J, in C.R.P. No. 967 of 1968. I therefore hold that the lower Court had the power to order restitution under its inherent powers and direct redelivery under section 144 of the Code of Civil Procedure, following the decision in *Thagaswamy Chettiar* v. *Bapoo Sahib*[2]."

Mr. K. Srinivasan sought to distinguish the above decision of Ramanujam, J., on the ground that the case arose under section 18 of the Act before its amendment in 1973 when the order of the Rent Controller was to be executed by a civil Court. Undoubtedly the situation arose before the amendment of section 18 in 1973. However, in my opinion, that does not in any manner render the principle laid down by Ramanujam, J., in applicable to the facts of the present case. As already stated after the amendment of section 18 of the Act in 1973 the Rent Controller himself executes the order of eviction as if it were an order of a civil Court and for that purpose he will have all the powers of a civil Court. If by this legal fiction the Rent Controller has all the powers of a civil Court in the matter of execution of an order of eviction, I am unable to understand why he would have no power to order an application for restitution which is nothing but an execution application. In this connection, it will be useful to refer to a decision of Ramaswami, J., in *Ramanujam Naidu* v. *Panchanatha Mudaliar*[1]. The question that has to be decided by the learned Judge was whether the Rent Controller had the power to excuse the delay in filing an application to bring on record the legal representatives. In that case, the application to bring on record the legal representatives of a deceased tenant was filed in execution. After referring to section 18 of the Act prior to and subsequent to the amendment of 1973, the learned Judge observed as follows:

"It is the contention of the learned counsel for the petitioner that prior to the amendment, the Rent Controller while executing the order made by him was acting as a civil Court and it is in those circumstances this Court held in *Subramani Pillai* v. *Rajakanni Nadar*[2], that the old rule 32 was not applicable to execution proceedings, and that after the amendment, the executing forum now is the Rent Controller and as such rule 25 would be applicable to the present execution petition filed under the amended section 18. I am unable to agree with this contention of the learned counsel. Under the old section the decree remains as that the Rent Controller and the Rent Controller executing it shall be deemed to be a civil Court. But under the new provision, the Rent Controller but the decree shall be executed as if it is a decree of the civil Court. If once the eviction order of the Rent Controller shall be deemed to be a decree of the civil Court, and is to be executed an if it were an order of the civil Court, then the provisions of Order 21, Civil Procedure Code, as far as may be, will be attracted. Rule 25 in terms is not applicable to a death occurring after the decree in execution proceedings as it in terms is applicable only to proceedings pending before the Rent Controller. Though the Rent Controller is now executing the decree, he is not executing an order of the Rent Controller, but an order which shall be deemed to be an order of the civil Court which he is executing. In such a proceeding rule 25 is not applicable. The ratio of

1. (1969) 2 M.L.J. 272.
2. (1949) 2 M.L.J. 699: 62 L.W. 876.

1. (1980) 93 L.W. 136.
2. (1971) 1 M.L.J. 223: 83 L.W. 758: A.I.R. 1971 Mad. 310.

the decision in *Subramania Pillai* v. *Rajakanni Nadar*[1], therefore still holds good and is applicable. It may also be mentioned that in executing the order of eviction as if it were an order of the civil Court, the Controller shall also have all the powers of the civil Court. In proceedings in execution in civil Courts, the provision of section 5 of the Limitation Act, is applicable and therefore, an application for excusing the delay in filing the petition for bringing on record the legal representatives, if there is any delay, could also be maintainable."

I am therefore of the view that an application for restitution is an application for execution and consequently the Rent Controller has got the power to order restitution.

8. The same conclusion can be arrived at on the basis of another principle of law as well, *viz., actus curiae nominem gravabit*. An act of Court shall prejudice no man. In other words, the Court will not allow a suitor to suffer by reason of a wrong order and the moment the mistake is discovered it will rectify the error and put him as far as possible in the position he would have occupied had the wrong order not been passed. It has further to be noted that section 144 is not exhaustive.

9. In *Birendra Nath Basu Thakar* v. *Surendra Kumar Basu Thakur*[2], it is observed thus:

"The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its act: *Rodger* v. *The Comptoir D'Escomptede Paris*[3]; *Jai Berhma* v. *Kedar Nath Marwari*[4]. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of section 144 of the Code of Civil Procedure, which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance."

1. (1971) 1 M.L.J. 223: 83 L.W. 758.
2. I.L.R. (1940) 1 Cal. 486: A.I.R. 1940 Cal. 260.
3. (1871) L.R. 3 P.C. 465.
4. (1922) I.L.R. 2 Pat. 10.

To quote Balakrishna Ayyar, J., in *Thangaswamy Chettiar* v. *Bapoo Sahib*[1]:

"It is a basic rule that the Courts will not permit a suitor to suffer by reason of a wrong order it has made and that when once the error is discovered it will be so far as possible put him in the position which he would have occupied if the wrong order had not been made. The right to restitution is not derived from section 144, Civil Procedure Code."

10. Ramanujam, J., also stated the above factum of law in *Md. Hussain* v. *Pitchai*[2], thus:

"The ratio of the decision in *Thangaswamy Chettiar* v. *Bapoo Sahib*[1], is based on the well-known principle that once a matter comes before a regular civil Court, its further course will be governed by the provisions of the Code and all the ordinary incidents of procedure of that Court will apply to that matter, as also the fact that an application for restitution is treated as an application for execution of a decree and is governed by Article 182 of the Limitation Act."

11. In this context it will be useful to quote the following statement of the law in Craies on Sthtute Law, in Seventh edition, page 111:

"If a statute is passed for the purpose of enabling something to be done but omits to mention in terms some detail which is of great importance (if not actually essential), to the proper and effectual performance of the work which the statute has in contemplation the Courts are at liberty to infer that the statute by implication empowers the detail to be carried out."

12. It is to get over the above principle of law that Mr. Srinivasan laid stress on the fact that the Rent Controller is not a Court and cited the line of cases to that effect. It is enough to refer to the decision of Ratnavel Pandian, J., in *Ghose Khan* v. *Rent Controller, Coimbatore*[3]. The learned Judge has in

1. (1949) 2 M.L.J. 699: 62 L.W. 876.
2. (1970) 2 M.L.J. 663.
3. (1981) 2 M.L.J. 388.

dealing with section 11 of the Act after the amendment held that the Rent Controller within the meaning of Act XVIII of 1960 is not a Court but only a statutory functionary competent to exercise the power given to him under the statute and therefore the provisions of the Indian Limitation Act are not applicable to proceedings pending before him, though he is clothed with all procedural powers of a civil Court in executing the order passed by him. The learned Judge was dealing with the question whether Article 120 of the Limitation Act would be attracted to proceedings before the Rent Controller. But as regards the power of execution the learned Judge has observed as follows:

> "It is well-settled that legal fictions are created only for some definite purpose and that the said fictions created by the statute cannot be extended beyond the purposes for which they were created. In interpreting the legal fiction of a statute, the Court is not expected to travel beyond the provisions of the statute by which the fiction is created and the Court also cannot extend such a fiction by importing another fiction. The fiction enacted by the legislature must be restricted by the plain terms of the statute: Vide *Bengal Immunity Company* v. *State of Bihar*[1], *Commissioner of Income-tax* v. *Amarchand*[2] and *Commissioner of Income-tax, Bombay City II* v. *Shakuntala and two others*[3]. Therefore, the Rent Controller ought to have seen that the fiction created by section 18 of the Act can be extended only for the limited purpose of exercising the powers vested in a civil Court, while executing the orders of eviction, such as those provided under Order 21 of the Code, but cannot be extended to matters such as those contained in Order 22 and the other provisions of the Code, relating to the execution of a decree."

The above passage will be sufficient for the present purpose to show that the said decision is not an authority on the question whether the Rent Controller has got the power to order redelivery when it is found that the very order on the basis of which delivery had been effected had been set aside.

13. I have therefore, no hesitation in rejecting the contention of Mr. Srinivasan, that the Rent Controller, after the amendment of the Act in 1973 has no powers to order restitution and effect redelivery of the property to the tenant notwithstanding the fact that the order of eviction has been set aside subsequently. To hold otherwise would be to set a premium on fraud and it would also be possible for a landlord to get *ex parte* orders of eviction behind the back of the tenant and obtain possession and the tenant would find himself in a helpless situation.

14. I, therefore, dismiss the writ petition, but in the circumstances without costs.

15. After I pronounced this judgment, Mr. K. Srinivasan, with his characteristic fairness brought to my notice a decision of Nainar Sundaram, J., in *T. K. Sundaram* v. *V. Balraj*[1], which the learned counsel received today. The learned Judge has taken the same view and held that the Rent Controller has jurisdiction to order re-delivery. This will also form part of the judgment.

R.S. —— *Petition dismissed.*

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1. 1955 S.C.J. 672: (1955) 2 S.C.R. 603: (1955) 2 M.L.J. (S.C.) 168: A.I.R. 1955 S.C. 661.
2. (1963) 1 S.C.J. 411: 48 I.T.R. 59: A.I.R. 1963 S.C. 1448.
3. (1966) 2 S.C.R. 871.

1. (1982) T.L.N.J. 297 (part 21).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and S. Nainar Sundaram, JJ.*

Kedariswaran and 96 others .. *Appellants**

v.

Sri Nadanapatheeswarar Temple, represented by its Fit Person, Thirukandeeswaram and another .. *Respondents.*

Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963), *sections* 3 (a) *and* (b), 7, 11 *and* 16 (4) (ii) *—Villagers claiming patta to various items of land*—Suo motu *enquiry by Settlement Tahsildar — Villagers held not entitled to patta — Direction that lands should vest with the Government—Appeal to Inams Abolition Tribunal—Appeal dismissed for default—During pendency of appeal the first respondent in second appeal, temple, moving Settlement Tahsildar to conduct fresh enquiry—Fresh enquiry conducted and patta directed to be issued in favour of temple in respect of the same lands — Appeal to Tribunal — Preliminary objection that Settlement Tahsildar has no power to rescind the earlier order—Tribunal confirming order of Settlement Tahsildar — Appeal to High Court—Order set aside.*

The Settlement Tahsildar conducted a *suo motu* enquiry under section 11 of Tamil Nadu Act XXX of 1963 and found that the lands comprised in three specified survey numbers were used by the villagers. He held that none was entitled to a ryotwari patta in respect of those lands under section 7 of the Act and that the lands should continue to vest with the Government under section 3 (*b*) and (*c*). The first respondent, temple filed an appeal to the Inams (Abolition) Tribunal and it was dismissed for default. But during its pendency, the first respondent had moved the Settlement Tahsildar to hold a fresh enquiry. In the fresh enquiry patta was directed to be issued to the first respondent in respect of the survey numbers which were originally directed to be vested with the Government. The appellants preferred an appeal against the grant of patta. The appeal was dismissed. On second appeal to the High Court,

Held: The Settlement Tahsildar has no power to review his own order which had been already taken by way of appeal to the Tribunal and that appeal had been dismissed for non-prosecution. The fact that the Settlement Tahsildar had once again considered the grant of patta will not in any way cure the defect inasmuch as there was absolutely no provision under the Tamil Nadu Act XXX of 1963 or the rules framed thereunder for such a course being adopted by the Settlement Tahsildar. Section 16 (4) (*ii*) also fortifies the view to the effect that the Settlement Tahsildar, who had decided the matter in respect of the same survey numbers after holding the enquiry under section 11 of the Act cannot review the same once over again.

R. S. Venkatachari, for Appellants.

Annamalai, for Respondent.

The Judgment of the Court was delivered by

Gokulakrishnan, J.—The appellants numbering 97 are villagers of Thirukandeeswaram near Panruti in South Arcot District. They claim patta to various items of Survey Numbers annexed to the order passed by the Settlement Tahsildar. There was a *suo motu* enquiry originally by the Settlement Tahsildar, Thanjavur, under section 11 of Tamil Nadu Act XXX of 1963 (hereinafter referred to as the Act). By order, dated 30th December, 1970, the Settlement Tahsildar, after enquiry, found that the lands in question *viz.*, S. Nos. 419|2-A, 421 and 419|2-B, are in the use of the villagers and as such, none is entitled to the issue of ryotwari patta under section 7 of the Act. Hence, the Settlement Tahsildar directed that these lands shall continue to vest with the Government under section 3 (*b*) read with section 3 (*c*) of the Act. As against this order, the first respondent herein filed an appeal in I.A.T.A. No. 91 of 1971 before the Inams Abolition Tribunal (Subordinate Judge), Cuddalore. The appeal was dismissed for default on 26th February, 1974. Exhibit R-19 is the order passed by the Settlement Tahsildar and Exhibit R-20 is the order passed in the appeal by the Tribunal dismissing the appeal for default.

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*Spl.T.A. No. 1359 of 1977.

31st August, 1982.

2. It is clear from the facts of the case that pending the appeal before the Inams Abolition Tribunal, the first respondent herein has moved the Settlement Tahsildar to conduct a fresh enquiry stating that it was withdrawing the appeal pending before the Tribunal. It is also clear from the records that a fresh enquiry was conducted by the Settlement Tahsildar and in that fresh enquiry, patta was directed to be granted in favour of the first respondent herein in respect of the survey numbers which were originally directed to be vested with the Government under section 3 (*b*) read with section 3 (*c*) of the Act. As against this grant of patta, the appellants herein preferred an appeal to the Inams Abolition Tribunal, Cuddalore. Before the Tribunal, the appellants took up a preliminary objection stating that the Settlement Tahsildar has no powers to rescind the order passed by him as early as 30th December, 1970, and as such, the grant of patta in favour of the first respondent herein for these survey numbers has to be set aside. This preliminary objection was over-ruled by the Tribunal observing that the second enquiry by the Settlement Tahsildar is not barred by *res judicata,* that further some of the appellants herein had taken part in the proceedings before the Settlement Tahsildar and they have given evidence in support of their claim for issue of ryotwari patta in their favour and that the subsequent order passed by the Settlement Tahsildar is not vitiated by any irregularity nor barred by *res judicata.* Finally, the Tribunal confirmed the order passed by the Settlement Tahsildar. It is as against the grant of patta by the authorities below, the appellants have preferred the above appeal.

3. Mr. R. S. Venkatachari, learned counsel appearing for the appellants, rest contended by agitating that the Settlement Tahsildar has no power to review his own order passed as early as 30th December, 1970, which is marked as Exhibit R-19 in this case. It is clear from Exhibit R-19 that the Settlement Tahsildar has not granted patta in favour of the first respondent herein in respect of 5.70 acres S. No. 419|2-A, 1.05 acres in S. No. 421 and 1.50 acres in S. No. 419|2-B and has stated that they will vest with the Government under section 3 (*b*) read with section 3 (*c*) of the Act.

4. Mr. Annamalai, learned counsel for the first respondent, submitted that the Settlement Tahsildar power to review his order when once the relevant documents are clear to the effect that the grant was in favour of the first respondent and by section 4 of the Act, it has to be presumed that the grant was in respect of both the warams. We are afraid that we cannot subscribe to this contention made by the learned counsel for the first respondent. We do not find any power for the Settlement Tahsildar to review his own order which has been already taken by way of appeal to the Tribunal and that appeal has been dismissed for non-prosecution. The fact that the Settlement Tahsildar has once again considered the grant of patta in respect of S. Nos. 419|2-A, 421 and 419|2-B will not in any way cure the defect inasmuch as there is absolutely no provision under the Act or the Rules framed thereunder for such course being adopted by Settelment Tahsildar. Section 16 (4) (*ii*) of the Act states:

> "Nothing in this section shall be construed as empowering the appropriate officer or authority to re-open any decision made under section 11."

This section also fortifies our view to the effect that the Settlement Tahsildar, who has decided the matter in respect of the abovesaid survey numbers after holding the enquiry under section 11 of the Act, cannot review the same once over again.

5. As regards the other survey numbers, in respect of which no such order was made in

Exhibit R-19, we have carefully considered the evidence on record and we are in agreement with the authorities below and confirm the grant of patta in favour of the first respondent herein. The evidence on record amply establishes that the grant was in favour of the first respondent and it is Iruwaram grant. Correctly, Mr. R. S. Venkatachari did not strenously argue on this aspect of the case.

6. For all these reasons we hold that the patta granted in favour of the first respondent herein in respect of S. Nos. 419|2-A, 421 and 419|2-B, over which a decision has already been rendered by the Settlement Tahsildar under Exhibit R-19, has to be set aside. In respect of the lands covered by other survey numbers, which are annexed to the order of the Settlement Tahsildar, the patta will issue in favour of the first respondent. It is always open to the first respondent to take such appropriate remedies available to it to agitate the matter in respect of the survey numbers mentioned in Exhibit R-19, which are directed to be vested with the Government under section 3 (*b*) read with section 3 (*c*) of the Act. Under these circumstances, the appeal is partly allowed in the above terms and dismissed in other respects. There will be no order as to costs.

R.S. — *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*P. R. Gokulakrishnan and V. Ratnam, JJ.*

The Secretary and Treasurer (The Chief General Manager), State Bank of India, Local Head Office, Madras-1 ... *Appellants**

v.

P. Muthukrishnan and another ... *Respondents*

and

P. Muthukrishnan .... *Appellant*

v.

The Secretary and Treasurer (The Chief General Manager), State Bank of India, Local Head Office and another ... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 11-D—Powers of Tribunal to impose lesser punishment—Shastri Award, paragraph 521 (4) (j) and (l) and Desai Award, paragraphs 18, 28—What is "Minor Misconduct"—M a bank employee—Charge memo. served by State Bank of India, Madras—Four charges levelled—Enquiry conducted—Charges held proved—Show cause notice issued—Written explanation given by employee—Staff Superintendent passing order, discharging employee from Bank's services—One month's salary and allowance in lieu of maintainance given—Appeal to Appellate Authority dismissed—Reference by Central Government of matter to the Industrial Tribunal—Action taken by management upheld by Tribunal—Writ petition to High Court by employee—Matter remanded to Tribunal—Writ appeal both by Bank as well as employee, dismissed—Remand order confirmed.

One '*M*' an employee of the State Bank was served with a charge memo. by the State Bank of India, Madras. There were as many as four charges against him. In the enquiry conducted against him the Enquiry Officer found charges 1, 2 and 4 proved and charge No. 3 not proved. Notice was given to the employee to show cause why the punishment

*W. A. Nos. 524 and 680 of 1979. *16th July, 1982.*

of discharge from the Bank's services on payment of one month's salary should not be imposed on him. The employee submitted his written explanation. The Staff Superintendent who is the disciplinary Authority passed an order discharging '*M*' from the services of the Bank on payment of one month's salary and allowance in lieu of maintenance. Against the order '*M*' preferred an appeal and the Appellate Authority dismissed the same. Upon representation by the party concerned, the Central Government referred the matter to the Industrial Tribunal, Madras. The Tribunal upheld the action taken, by the Management in discharging '*M*' from service. Against the award of the Tribunal '*M*' a filed writ petition to the High Court. The High Court remanded the matter to the Tribunal for the purpose of finding out as to under which category of "minor misconduct" the acts committed by '*M*' would fall. Against that order both the Bank and '*M*' filed writ appeals.

Held, that inasmuch as '*M*' had not objected to the Staff Superintendent being the disciplinary authority, in his objections before the Enquiry Officer and the Tribunal, and in view of the fact that such an irregularity, if any, does not affect jurisdiction as such, the Staff Superintendent was competent in framing the charges. There was no question of discrimination in this case.

[*Paras.* 7, 8.]

The Tribunal has power to consider a lesser punishment and has ample power to bring the offence under any category envisaged in paragraph 52, of the Shastri Award. Undoubtedly such power is available to the High Court while dealing with such cases under Article 226 of the Constitution. The Tribunal and the High Court have ample power to bring the offence committed by '*M*' under the proper provision of law, even though he had been charged for a serious offence. This power is derived both from section 11-A of the Industrial Disputes Act and also under the law as it existed prior to introduction of section 11-A of the Act.

[*Para.* 24.]

Cases referred to :—

Pradyat Kumar v. *C. J. of Calcutta*, 1956 S. C. J. 259 : (1955) 2 S. C. R. 1331 : A. I. R. 1956 S. C. 285; *Workmen of Indian Overseas Bank* v. *Indian Overseas Bank*, (1973) 1 L. L. J. 316; *State of Madhya Pradesh* v. *Bhardul Singh*, (1970) 1 S. C. C. 108; *Gujarat Steel Tubes Limited* v. *G. S. T. Mazdoor Sabha*, (1980) 1 L. L. J. 137 : (1980) 2 S. C. C. 593 : (1980) 2 S. C R. 146 : (1980) Lab. I. C. 1004 : A. I. R. 1980 S. C. 1896; *Navinchandra Shakerchand Shah* v. *The Manager, Ahmedabad Co-operative Department Stores Limited*, (1978) 19 G. L. R. 180 : (1979) 1 Lab. L J 60 (Guj.); *Union of India* v. *Bungo Steel Furniture (P) Ltd.*, (1967) 2 S. C. J. 440 : (1967) 1 S. C. R. 324 : A. I. R. 1967 S. C. 1032.

Appeals under clause 15 of the Letters Patent against the order of Mr. Justice Sathiadev dated 30th May, 1979 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2384 of 1976 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the concerned records from the 2nd Respondent, the Industrial Tribunal (duly constituted by the Central Government), Madras 600 001 relating to I. D. No. 43 of 1974, quash the award dated 20th December, 1975 in I. D. No. 43 of 1974 filed and marked as Exhibit-A.

M. R. Narayanaswamy, for *King and Partridge*, for Appellants.

A. Ramachandran for *Row and Reddy*, for Respondents.

The Order of the Court was made by

Gokulakrishnan, J.—These two appeals arise out of the Judgment of Sathiadev J., in Writ Petition No. 2384 of 1976.

2. Writ Petition No. 2384 of 1976 was filed by one P. Muthukrishnan to quash the award of the Industrial Tribunal, Madras, passed in I. D. No. 43 of 1974 dated 20th December, 1975. In I. D. No. 43 of 1974 the Industrial Tribunal took up for decision the reference made by the Central Government relating to the discharge of the said Muthukrishnan from the services of the State Bank of India.

3. The short facts are :—Muthukrishnan was served with a charge-memo. by the State Bank of India, Madras. There were as many as four charges against him. The first charge related to purchasing of cheques for large amounts from one V. J. Bhaskar Rao by the delinquent in his personal capacity while acting as the official in-charge of the

Nungambakkam Pay Office. There were twenty such purchases during the years 1966 and 1967, and they were acts of gross misconduct falling under paragraph 521 (4) (*j*) and (1) of the Shastri Award read in conjunction with paragraph 18.28 of the Desai Award. The second charge was that Muthukrishnan, in collusion and conspiracy with V. J. Bhaskar Rao, permitted and enabled Bhaskar Rao unauthorisedly to encash cheques drawn by him on his account with the Madras local head-office without sufficient balance in his account to recover the drawings at the time of such encashments, and in pursuance of the said conspiracy, he deliberately delayed despatch of such cheques with remittance schedules for periods ranging from two to days with a view to afford time to V. J. Bhaskar Rao to replenish his account with sufficient funds to meet the cheques later when received at the local head office. The third charge related to the encashment of a cheque for Rs. 200 on 9th February, 1967, drawn by another on his personal account. The fourth charge was that he encashed on his personal account. The fourth charge was that he encashed on his personal account eight cheques for a total sum of Rs. 6,000 drawn by one C. P. Radhakrishnan and delayed despatch thereof for periods extending from two to four days with intention to afford unauthorised personal favour to the said Radhakrishnan and thus caused wrongful loss to the Bank. These acts were gross misconduct falling under paragraph 521 (4) (*j*) of the Shastri Award read in conjunction with paragraph 18.28 of the Desai Award. Muthukrishnan, by his explanation marked as Exhibit M-4 denied all these allegations and said that he had not committed any act detrimental to the welfare of the Bank. By the order marked Exhibit M. 27 he was placed under suspension. In the enquiry conducted against him, the Enquiry Officer found charge Nos. 1, 2 and 4 proved and charge No. 3 not proved. On those findings, a notice under Exhibit M-8 was given to Muthukrishnan to show cause why the punishment of discharge from the Bank's service on payment of one month's salary and allowances in lieu of notice should not be imposed on him. Exhibit M.9 is the written explanation given by Muthukrishnan. The Staff Superintendent, who is the Disciplinary Authority, passed an order under Exhibit M.10 discharging Muthukrishnan from the Bank's service on payment of one month's salary and allowances in lieu of notice. Against this order of discharge passed by the Disciplinary Authority, Muthukrishnan preferred an appeal under Exhibit M-11. The appellate authority, *viz.*, The Deputy Secretary and Treasurer of the State Bank of India, dismissed the appeal of Muthukrishnan on the ground that no point was made out to interfere with the findings of the Enquiry Officer. Upon representation by the party concerned, the Central Government referred the matter to the Industrial Tribunal, Madras. The Industrial Tribunal framed an issue to the effect:

> "Whether the action of the management of the State Bank of India, Madras in discharging Shri P. Muthukrishnan, from the services of the Bank with effect from the 14th April, 1969 is justified? If not, to what relief is the employee entitled?".

The Tribunal found that Muthukrishnan, in collusion with Bhaskar Rao, purposely delayed the despatch of cheques presented by Bhaskara Rao at the Nungambakkam Branch and thereby committed the offences with which he stood charged under charges Nos. 1, 2 and 4. The Tribunal also found that there were no extenuating circumstances to award a lesser punishment to the delinquent. Thus, the Tribunal upheld the action taken by the Management in discharging Muthukrishnan from service. As against this award of the Tribunal, Muthukrishnan filed W. P. No 2384 of 1976.

4. While disposing of W. P. No. 2384 of 1976, Sathiadev, J held on the question whether the authority who took the disciplinary proceeding against Muthukrishnan had no competence, that the Staff Superintendent is the competent authority to initiate the proceedings and rightly it has been done in the case of Muthukrishnan. On the second charge, the learned Judge found that since no gross negligence or serious loss to the Bank had been made out under that charge, it could not be said that Muthukrishnan is guilty of gross misconduct. Dealing with charge No. 4, also, the learned Judge found there was no gross misconduct on the part of Muthukrishnan. The learned Judge observed: "To read sub-paragraph (4) (*j*) of paragraph

521 of the Shastri Award to include all kinds of acts even though they may not be due to gross negligence or they may not result in serious loss to the Bank, would lead to a misreading of the classifications made in para. 521 of gross misconduct and minor misconduct. The learned Judge further said: "Unless the act committed by an employee and which is found to be prejudicial to the interests of the bank stems out of a gross negligence or results in serious loss, such acts will be outside the ambit of para. 521 (4) *(j)* of the Shastri Award." According to the learned Judge, since the charges framed would not come within the ambit of paragraph 521 (4) *(j)* the matter would have to be remanded, and accordingly he remanded the matter to the Tribunal for the purpose of finding out as to under which category of 'minor misconduct' the acts committed by Muthukrishna would fall. It is as against this order of remand with certain observations, both Muthukrishnan and the Bank have filed the above appeals.

5. Writ Appeal No. 524 of 1979 is by the Bank, while Writ Appeal No. 680 of 1979 is by Muthukrishnan. For purposes of convenience, the parties would be referred to in this judgment as the Bank of Muthukrishnan, as the case may be.

6. Mr. M. R. Narayanaswamy, learned counsel appearing for the Bank contended that when the delinquent has taken a plea that no misconduct has been committed by him, he must stand or fail on it and it is not open to the Court to find that only minor misconduct has been committed. The next contention was that when the Tribunal has recorded its finding regarding the fraudulent intention of the delinquent in encashing the cheques covered by the charges, the decision of the Tribunal cannot be reviewed in Writ Proceedings. The learned counsel further submitted that the interpretation to paragraph 521 (4) *(j)* and (1) of the 'Shastri Award' given by the learned Judge is erroneous. Finally, the learned counsel submitted that inasmuch as the delinquent had not raised the plea of minor misconduct before the Industrial Tribunal, the Court has gone wrong in giving a decision to the effect that the offence committed is only a minor misconduct. Further the Court should not have directed the Tribunal to give a finding as to under which category of minor misconduct the offence would fall, but, instead, it should have remitted the matter to the Tribunal to find out whether the minor or major misconduct has been committed by the delinquent concerned.

7. Mr. Ramachandran, learned counsel appearing for Muthukrishnan contended that the conduct of the enquiry was vitiated since the Staff Superintendent had no authority to frame the charges against Muthukrishnan and that there was discrimination in awarding the punishment to Muthukrishnan. Mr. Ramachandran fairly stated that these were the two points he would raise in the appeal filed by his client. As regards the contention of Mr. M. R. Narayanaswamy learned counsel appearing for the Bank Mr. Ramachandran said that when he pleads that the discharge from service itself is wrong, it cannot be taken that Muthukrishnan had not pleaded for a lesser punishment. The learned counsel pointed out to the stand taken by Muthukrishnan at various stages wherein he has asked for the imposition of a lesser punishment. In order to substantiate that it is only a minor misconduct on the part of Muthukrishnan, Mr. Ramachandran took us through various facts in this case as establishing that there was no fraud or collusien as between Muthukrishnan and others who have encashed the cheques in question. According to the learned counsel, the Bank has not proved, fraud on the part of Muthukrishnan in this case, and to this effect, Sathiadev, J., has given a finding. Finally, the learned, counsel submitted that under section 11-A of the Industrial Disputes Act the Tribunal has ample power to impose a lesser punishment on the delinquent concerned.

8. It is clear from the statement of claim filed by Muthukrishnan that absolutely no objection was taken as regards the jurisdiction or competence of the Staff Superintendent in framing the charges. It is also significant to note that in the additional claim statement Muthukrishnan has taken the stand that the Staff Superintendent alone could take action and not the Manager before the Industrial Tribunal; an argument was advanced to the effect that the agent is not empowered to take disciplinary action and

that the charge-sheet etc., were issued by him and he is not the Disciplinary Authority. As a matter of fact, the Tribunal has found that Exhibit M. 10 which is the order of discharge, was issued only by the Staff Superintendent who is the Disciplinary Authority, and that the domestic enquiry was conducted strictly in conformity with the provisions of the Shastri Award. As per paragraph 521 (12) of the Shastri Award the Bank should decide which officer shall be empowered to take disciplinary action in the case of each office or establishment, and it should also make provision for appeals against orders passed in disciplinary matters. As per paragraph 521 (12) on 23rd October, 1967, the Bank notified, T. Shanmugam as Enquiry Officer and V. S. Natarajan, Deputy Secretary and Treasurer of the Bank as the appellate authority. From Exhibits M. 32 and M. 33, it is clear that it was that disciplinary authority who took disciplinary action and he instructed his subordinates to serve copies of the charge etc., on Muthukrishnan and obtain his explanation. Exhibit M-10 is the order of discharge and it clearly shows that it is only the Staff Superintendent, *i. e.*, the disciplinary authority, who passed the order. Inasmuch as Muthukrishnan had not objected to the Staff Suprintendent being the disciplinary authority, in his objections before the Enquiry Officer and the Tribunal, and in view of the fact that such an irregularity, if any, does not affect the jurisdiction as such, we do not find there is any merit in the said contention of Mr. Ramachandran learned counsel appearing for Muthukrishnan. We are in agreement with the finding of the learned single Judge on this aspect of the case.

9. In this connection, it is useful to refer to the decision reported in *Pradyat Kumar* v. *C. J. of Calcutta*[1], wherein the Supreme Court has recognised the delegation of power by the competent authority to another authority to enquire into the charges framed against a delinquent. No doubt, such a power is limited in nature, and as far as the present case is concerned, only such limited delegation is made by the Staff Superintendent (Disciplinary Authority) as we have noticed in the foregoing paragraphs.

10. In *Workmen of Indian Overseas Bank* v. *Indian Overseas Bank*[1], the Delhi High Court has held, following the ruling in *State of M. P. and others* v. *Bhardul Singh*[2], that it is not necessary for the authority which is to pass the order of dismissal to initiate the enquiry itself, that even if the charge-sheets were issued by some other person who is not the designated authority, the same is not such an infirmity as to render the whole proceeding illegal and void and that if the workman had not objected to the issue of the charge-sheet by another person at the earliest stage, he could not be permitted to urge the same as a ground to challenge the ultimate order of his dismissal by the Disciplinary Authority. The above ratio of the Supreme Court followed in the above referred Delhi decision, in our opinion, will squarely apply to the present case.

11. The next question we have to consider is one of discrimination alleged by Mr. Ramachandran, learned counsel for Muthukrishnan. It is stated that in the case of one K. P. Ramachandran who, admitted the guilt, he has not been discharged from service, while, Muthukrishnan has been discharged from service for the very same misconduct alleged against him. The Tribunal has discussed this aspect clearly. K. P. Ramachandran was encashing his own cheques, while Muthukrishnan was purchasing cheques of his close friend who was working in the local Head-Office of the State Bank of India and helping him to replenish the amounts while he had no funds in the local Head-Office in his account. Further, it is seen that K. P. Ramachandran admitted his guilt which related to four instances, while in the case of Muthukrishnan there were 21 instances of purchase of cheques by him to accommodate his friend Bhaskara Rao. Besides there were also other instances of purchasing cheques by Muthukrishnan from others. All these factors, in our opinion, definitely demolish the contention of discrimination put forth by Mr. Ramachandran, learned counsel appearing for Muthukrishnan. We do not find any substance in the argument on this aspect, and we are in agreement with the learned Judge in his finding on tne question of discrimination.

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1. 1956 S. C. J. 259 : (1955) 2 S. C. R. 1331 : A.I. R. 1956 S. C. 285.

1. (1973) 1 L. L. J. 316.
2. (1970) 1 S. C. C. 108.

12. Finally, we have to consider the contention of Mr. M. R Narayanaswamy regarding the remand made by the learned Judge in order to find as to what kind of minor misconduct that has been committed by Muthukrishnan. We have already noticed in the paragraphs supra, the contention of the learned counsel on this aspect. Before dealing with this contention it will be useful to refer to the affidavit filed by Muthukrishnan in I. D. No. 43 of 1974 wherein he has prayed for the reception of certain documents by the Industrial Tribunal. In that affidavit, dated 5th November, 1975, Muthukrishnan has stated that in view of section 11-A of the Industrial Disputes Act, the Tribunal has wide powers to interfere even in the matter of punishment. The Industrial Tribunal in its Award has stated that Mr. N. G. R. Prasad arguing for Muthukrishnan submitted that the punishment of discharge from service was excessive and that the Tribunal could award some lesser punishment instead. These were the representations before the Tribunal for awarding a lesser punishment of Muthukrishnan.

13. In the light of the above materials, we can now usefully refer to the decision reported in *Gujarat Steel Tubes Limited* v. *G. S. T. Mazdoor Sabha*[1], wherein the Supreme Court has considered the powers of the High Court and the Tribunal for awarding lesser punishment in proceedings under the Industrial Disputes Act. The Supreme Court has approved the observation of the Gujarat High Court in *Navinchandra Shakerchand Shah* v. *Ahmedabad Co-op. Department Stores Limited*[2], to the effect that the amended Article 226 of the Constitution would enable the High Court to interfere with an award of the Industrial Adjudicator if that is based on a complete misconception of law or it is based on no evidence or that no reasonable man would come to the conclusion to which the Arbitrator has arrived. Continuing, the Supreme Court has observed :

"102. This long excursion has become important because, once in a while social legislation which requires sharing of social philosophy between the Parliament and the Judiciary meets with its Waterloo in the higher Courts because the true role of interpretation shifts from Judge to Judge. We are clearly of the view that statutory construction which fulfils the mandate of the statute must find favour with the Judges, except where the words and the context rebel against such flexibility. We would prefer to be liberal rather than lexical when reading the meaning of industrial legislation in the growing economy of India. The necessary conclusion from this discussion is that the expression "tribunal" includes, in the statutory setting, an Arbitrator also. Contemporaneous paralegislative material may legitimately be consulted when a word of wider import and of marginal obscurity needs to be interpreted. So viewed, we are not in a sound-proof system and the I. L. O. recommendation accepted by India and the objects and reasons of the amending Act leave no doubt about the sense, policy and purpose. Therefore, section 11-A applies to the Arbitrator in the present case and he has the power to examine whether the punishment imposed in the instant case is excessive. So has the High Court, if the award suffers from a fundamental flaw.

"103. A study of the lengthy award discloses no mention of section 11-A, and presumably, the authority was unmindful of that provision while rendering the verdict. In a limited sense, even prior to section 11-A, there was jurisdiction for a Labour Tribunal, including an Arbitrator, to go into the punitive aspect of the Management's order. This Court has, in a catena of cases, held that a *mala fide* punishment if grotesquely condign or perversely harsh or glaringly discriminatory an easy inference of bad faith, unfair labour practice or victimisation arises. The wider power to examine or prescribe the correct punishment belongs to the Tribunal/Arbitrator even under section 11 if no enquiry (or a defective enquiry which is bad, therefore can be equated with a no-enquiry situation) has been held by the

1. (1980) 1 L. L. J. 137 : (1980) 2 S. C. C. 593 : (1980) 2 S. C. R. 146 : (1980) Lab. I. C. 1004 : A. I. R. 1980 S.C 1896.
2 (1979) 1 L. L. J. 60 (Guj.) : (1978) 19 G. L. R. 108.

management. For, then there is no extant order of guilt or punishment and the Tribunal determines it afresh. In such a virgin situation both culpability and qualification of punishment are within the jurisdiction of the Tribunal/Arbitrator. The present is such a case.

"105. Lastly, as rightly urged by counsel for the Sabha, an Arbitrator has all the the powers the terms of reference, to which both sides, are party, confer, Here, admittedly, the reference is very widely worded and includes the nature of the punishment. The law and the facts do not call for a further elaboration and we hold that, in any view, the Arbitrator had the authority to investigate into the propriety of the discharge and the veractity of the misconduct. Even if section 11-A is not applicable, an Arbitrator under section 10-A is bound to act in the spirit of the legislation under which he is to function. Commercial Arbitrator who derives his jurisdiction from the terms of reference will by necessary implication, be bound to decide according to law and, when one says "according to law", it only means existing law and the law laid down by the Supreme Court being the law of the land, an Aribitrator under section 10-A will have to decide keeping in view the spirit of section II-A (see *Union of India* v. *Bungo Steel Furniture Private Limited*[1].)

14. The question of fraudulent intention on the part of Muthukrishnan was discussed by the learned Judge in detail. No doubt, the Industrial Tribunal has held that there was fraudulent intention on the part of Muthukrishnan and that is why he delayed the despatch of cheques of Bhaskar Rao in order to benefiit Bhaskar Rao and to give time to him to replenish the amounts in the interval. The Tribunal has also held that if all the items mentioned in the Annexure to Exhibit M-3, are compared with Exnibit M-19, the fraud is apparent. The learned single Judge discussed the question of fraud in relation to the negligence of Muthukrishnan and loss to the Bank and has held there was no gross misconduct on the part of Muthukrishnan or serious loss to the Bank. Therefore, the learned Judge found that presumption as regards fraud from the attendant circumstances of the case cannot be sustained. We are in complete agreement with the said finding of the learned Judge.

15. We have, in the paragraphs supra, considered the effect of Muthukrishnan pleading for a lesser punishment. He has also prayed for invoking the provisions of section 11-A of the Industrial Disputes Act for awarding a lesser punishment. In the decision reported in *Gujarat Steel Tubes Limited* v. *G. S. T. Mazdoor Sabha*[1], observations from which we have extracted already, the Supreme Court has held that in a limited sense, even prior to section 11-A there was jurisdiction for a Labour Tribunal, including an Arbitrator, to go into the punitive aspect of the Management's order.

Section 11-A of the Industrial Disputes Act states:—

> "Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication, and in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.
>
> Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

16. Section 10-A (4) states that the arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

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1. (1967) 1 S. C. R. 324 : (1967) 2 S. C. J. 440 : A. I.R. 1967 S. C. 1032.

1. (1980) 1 L. L. J. 137 : (1980) 2 S. C. R. 146

17. Construing section 10-A, the Supreme Court, in the *Gujarat Steel Tubes Limited case*[1], has stated that even if section 11-A is not applicable, an arbitrator under section 10-A is bound to act in the spirit of the legislation under which he is to function.

18. In this case, the reference under the Industrial Disputes Act was made to the Tribunal on 15th November, 1976 and much earlier to the said date, section 11-A has been introduced into the Act. Hence section 11-A is available to the party in this case. If this position is indisputable the Tribunal has ample power to award a lesser punishment in lieu of discharge or dismissal from service as the circumstances of the case may require.

19. Paragraph 521 (3) of the Shastry Award states that if after steps have been taken to prosecute an employee, or to get him prosecuted, for an offence he is not put on trial within a year of the commission of the offence, the management may then deal with him as if he had committed an act of gross misconduct or of minor misconduct as defined in the succeeding sub-paragraph ; provided that if the authority which was to start prosecution proceedings refuses to do so or comes to the conclusion that there is no case for prosecution; it shall be open to the management to proceed against the employee under the provisions set out in sub-paragraphs (9) and (10) relating to discharge, but he shall be deemed to have been on duty during the period of suspension, if any, and shall be entitled to the full wages and allowances and to all other privileges for such period.

20. Paragraph 521 (4) enumerates what all constitutes gross misconduct. The charge made against Muthukrishnan is one under Paragraph 521 (4) *(j)* and (1). Paragraph 521 (4) (*j*) states "doing any act prejudicial to the interests of the bank, or gross negligence or negligence involving or likely to involve the bank in serious less" Sub-para. (4) (1) states abetment or instigation of any of the acts or omissions above mentioned."

21. Paragraph 521 (5) provides for punishment if the employee is found guilty of gross misconduct.

22. Paragraph 521 (6) enumerates acts of minor misconduct.

23. Paragraph 521 (7) provides for punishment for minor misconduct.

24. We have already seen that the Tribunal has power to consider a lesser punishment and has ample power to bring the offence under any category envisaged in Paragraph 521 of the Shastry Award. Undoubtedly, such power is available to the High Court while dealing with such cases under Article 226 of the Constitution. The basis of the accusation is misconduct. Paragraph 521 (4), as already seen, deals with gross misconduct and Paragraph 521 (6) deals with minor misconduct. The discussion made by the learned single Judge is based upon the acts of commission and omission done by Muthukrishnan, which acts of commission and omission are borne out by the evidence on record". After proper discussion, the learned Judge held that the acts committed by Muthukrishnan would come only under the category of 'minor misconduct' and therefore he has set aside the award of the Tribunal and remitted the matter to the Tribunal to find out as to what kind of 'minor misconduct' Muthukrishnan is liable for. We have already noticed that the Tribunal and the High Court have ample power to bring the offence committed by Muthukrishnan under the proper provision of law, even though he had been charged for a serious offence. This power is derived both from section 11-A of the Industrial Disputes Act and also under the law as it existed prior to the introduction of section 11-A into the Act. When such power is there and when it is seen that relevant matters have been taken into account by the learned single Judge to bring the acts of Muthukrishnan within the scope of minor misconduct, we cannot interfere in this writ appeal with such a conclusion arrived at by the learned Judge.

25. From the foregoing discussion, we do not find any merits in both the writ appeals, and accordingly, both the writ appeals are dismissed. There will be no order as to costs.

26. The Tribunal is directed the expedite the matter as speedily as possible, since the show cause notice issued by the management

1. (1980) 1 L. L. J. 137 : (1980) 2 S. C. C 593 : (1980) 2 S. C. R. 146; A. I. R. 1980 S. C. 1896.

to the appellant. Muthukrishnan dates back to 23rd August, 1967, and the reference of the dispute by the Government to the Tribunal to 15th November, 1976.

R. S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

K Poochammal ... *Appellant**

v.

P. Chinnasamy Thevar and others ... *Respondents.*

Hindu Law—Joint family owning property—Kartha entering into a contract for sale of property to discharge earlier usufructuary mortgage of such property—Competency—Alienation cannot be challenged.

The Kartha of a Hindu joint family is competent to enter into a contract for sale of the property to discharge an earlier mortgage, to incur expenses for the marriage of his daughter and to maintain the family itself. Even assuming that anyone is entitled to object to the absence of the benefit to the family it is only the son and not the usufructuary mortgagee whose rights as mortgagee are intact under the alienation. [*Para.* 8.]

Cases referred to:—

Baluswami Aiyar v. *Lakshmana Iyer*, (1921) I. L. R. 44 Mad. 605 : 41 M. L. J. 129 : 13 L. W. 562 : A.I.R. 1921 Mad. 172; *Bālmukand* v. *Kamlawati*, (1964) 6 S. C. R. 321 : (1965) 1 S. C J. 212 : (1965) 1 An. W. R. (S. C.) 6: (1965) 1 M. L. J. (S. C.) 6 : A. I. R. 1964 S. C. 1385.

*S. A. Nos. 1054 and 1055 of 1978. *23rd November,* 1981.

Appeals against the decree of the District Court, Madurai, dated 22nd March, 1977, and passed in Appeal Suit Nos 179 and 172 of 1976 respectively preferred against the decree of the Court of the District Munsif of Thirumangalam, dated 31st January, 1976, and passed in Original Suit Nos. 487 of 1973 and 118 of 1974 respectively.

E. Padmanabhan, for Appellant.

N. V. Balasubramanian and *S. C. Palaniswamy*, for Respondents.

The Court delivered the following

JUDGMENT.—These are two second appeals arising out of two suits, filed in the Court of the District Munsif of Thirumangalam. O. S. No. 487 of 1973 was filed by one Chinnaswami Thevar against two persons, Perumal and Poochammal. Perumal had entered into an agreement with Chinnaswami Thevar under Exhibit A-21 on 12th June, 1972, and the suit was for specific performance. Poochammal was the usufructuary mortgagee of the suit property and she claimed to have an agreement, dated 25th November, 1971, marked as Exhibit B-3, for conveying the very same property. She filed O. S. No. 118 of 1974 for specific performance of the agreement in her favour. Both the suits were tried together and a common judgment was rendered. The first defendant in both the suits is Perumal and according to him, he had entered into the respective agreements. He, however, contended in O. S. No. 487 of 1973, the suit filed by Chinnaswami. that the agreement in favour of Poochammal, the usufructuary mortgagee and the plaintiff in the other suit, was anterior in point of time and therefore, the earlier suit, for specific performance should be dismissed. Poochammal who was the second defendant in O. S. No. 487 of 1973 defended that suit by contending that she had an earlier agreement in her favour and that the agreement, dated 12th June, 1972, was merely a collusive one to defeat her rights. In the second suit by Poochammal, the contention of Perumal was that the plaintiff, Poochammal, was not ready and willing to perform her part of the contract and that therefore, another agreement was entered into in favour of Chinnaswami and that since

the conditions of the agreement with Poochammal had not been complied with, she was not entitled to the relief of specific performance.

2. Perumal's son, Chellappa, was impleaded as second defendant in O. S. No. 118 of 1974 filed by Poochammal. He toed the line of his father, Chinnaswami, the plaintiff in the earlier suit, and contended that Poochammal was not entitled to specific performance.

3. The trial Court held that the sale agreement dated 25th November, 1971, in favour of Poochammal was a concocted one and that she was not therefore entitled to any relief. He decreed the suit filed by Chinnaswami and directed specific performance of the agreement in his favour. The said Poochammal filed two appeals and the learned District Judge found, agreeing with the trial Court that Exhibit A-1 was a true and genuine document and that Exhibit B-3 was not a true and genuine document having been brought about subsequently to defeat and defraud the interests of Chinnaswami. He therefore concurred with the decree passed in the respective suits by the trial Court

4, At the time of admission of the second appeals at the instance of the said Poochammal, the following questions of law arising out of the common judgment of the learned District Judge :—

"(1) Whether the decision of the Court is materially vitiated in that it failed to decide the question whether Exhibit A-1 agreement-holder is a *bona fide* purchaser for value without notice of Exhibit B-3 agreement?

(2) Whether the judgment of the Courts below is vitiated by reason of the failure to take proper account of the fact that the suit properties are admittedly joint family properties and that in the circumstances, there could be a decree for specific performance in favour of the appellant in respect of the entire properties or at least in respect of the right, title and interest of the second defendant were formulated?"

Learned counsel for the appellant contended that the said Poochammal was entitled to specific performance of her agreement and that in any event, Chinnaswami, the plaintiff was not entitled to specific performance. Alternatively, he pleaded that Chinnaswami, the plaintiff would be entitled to specific performance of only the half share of the joint family properties available to Perumal and that with reference to the other half share, Chellappa, the second defendant in O. S. No. 118 of 1974, would not be bound as he had not signed the agreement.

5. The first question formulated by this Court as above is capable of easy answer. Exhibit A-1 agreement in favour of Chinnaswami is dated 12th June, 1972. It is on a stamp paper and the consideration set out in the document for conveying the property is Rs. 1,500

6 Under Exhibit B-3, the agreement in favour of Poochammal, the consideration set out is Rs. 2,000. If there was really an earlier agreement, dated 25th November, 1971, in favour of Poochammal, it is unlikely that Perumal would have entered into an agreement on 12th June, 1972, under Exhibit A-1 with Chinnaswami. It is also significant to find that Exhibit B-3 is not on stamp paper and only revenue stamps have been used and Perumal and Chellappa, the father and the son, have signed on the revenue stamps. This kind of agreement could have been brought into existence at any time. In view of the improbability of the agreement, dated 25th November, 1971 having come into existence, the only agreement that would have to be looked into for the purpose of specific performance is the agreement, dated 12th June, 1972, marked as Exhibit A-1.

7. Learned counsel for the appellant contended that in reply to the notice issued under Exhibit A-2, dated 6th July, 1973 by Chinnaswani requiring the execution of a document, Exhibit A-4 dated 16th June, 1973 was sent. This reply did not make any reference to the existence of Exhibit B-3. The contention urged was that Exhibit A-4 will not disprove the existence of an earlier agreement in favour of Poochammal merely because the first defendant did not make any reference to it in his reply. It is unnecessary to go into this aspect in view of the fact that I have found that Exhibit B-3 could not have come into existence on 25th November, 1971.

It is not a genuine agreement and therefore. Poochammal would not be entitled to specific performance. Further, if Exhibit B-3 goes, then Poochammal would have no *locus standi* to question Exhibit A-1 which was entered into by Perumal in favour of Chinnaswami. I have looked into the agreement. There is nothing to doubt its genuineness or authenticity. The only criticism the learned counsel for the appellant was in a position to advance was that Perumal could only have alienated a half share and his son Chellappa would not be bound by whatever Perumal did with reference to the remaining half share belonging to Chellappa. It is in this connection that he brought to my notice two decisions. The first decision is that of *Baluswami Aiyar* v. *Lakshmana Iyer*[1]. In that case a managing member of a joint family entered into a contact to sell an item of family property. That contract was not proved to be binding on the other members. It was, therefore, held that specific performance could not be granted so as to direct execution of a conveyance of the entire property and that it was open to the purchaser to get specific performance only so far as the share of the vendor was concerned on payment of the full consideration agreed upon without any abatement. In the present case, the document (Exhibit A-1) refers to the subsistence of an usufructuary mortgage in favour of Poochammal and to the necessity to borrow money for performing the marriage of a daughter of Perumal. The consideration was also to be utilised for family expenses. There is no evidence to show that these recitals in Exhibit A-1 are in any manner wrong. The statements in Exhibit A-1 remain uncontradicted. If there was a necessity for selling the property under Exhibit A-1, the there is no question of the alienation being confined only to Perumal's share. The family property could be alienated for the purpose of meeting family necessity. The fact that Chellappa was not a pary to Exhibit A-1 is not of any consequence, because admittedly Perumal was the manager of the joint family. The manager could alienate family properties for binding necessity.

8. The other decision is that of the Supreme Court in *Balmukand* v. *Kamlawati*[1]. In that case' Balmukund entered into a contract with the kartha of a joint family for purchase of a family property. The property consisted of a fractional share in a large plot of land. Earnest money was paid to the kartha. The kartha did not execute a sale deed and therefore, Balmukund instituted a suit for specific performance. The other members of the family were the brothers of the kartha. They were all adults at the time of the contract. They were impleaded as defendants. The suit was resisted on the ground that there was no legal necessity and that the contract for sale would not be for the benefit of the family. The trial Court as well as the High Court upheld these contentions regarding the absence of legal necessity and benefit to the family. Before the Supreme Court it was contended that even though there was no legal necessity, the transaction was for the benefit of the family and that the kartha, as a prudent owner, was entitled to enter into a contract for the benefit of the family. The Supreme Court pointed out that no part of the joint family property could be parted with by the manager on the ground of the alleged benefit of the family when the transaction was opposed by the adult members of the family and that the granting of specific performance also was always in the discretion of the Court. In that case it was found that the trial Court as well as the appellate Court were justified in refusing to order specific performance. I do not find that this case is of any assistance to the problem before me. As I have already pointed out, the recitals in Exhibit A-1 remain uncontradicted. Hence the kartha was competent to enter into a contract for sale of the property to discharge an earlier mortgage, to incur expenses for the marriage of a daughter and to maintain the family itself. Even assuming that anyone is entitled to object to the absence of benefit to the family, it is Chellappa, the son of Perumal. Chellappa has not come forward with any appeal and it is not for Poochammal, to set up herself as if she could challenge the finding of benefit to the family.

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1. (1921) I. L.R.44 Mad. 605 : 41 M. L. J. 129 : 13 L. W. 562; A.I R. 1921 Mad. 172.

1. (1964) 6 S.C.R. 321 : (1965) 1 S. C. J. 212 : (1965) 1 An. W. R. (S. C.) 6 : (1965) 1 M. L.J. (S. C.) 6 : A. I. R. 1964 S. C. 1385.

She is only a usufructuary mortgagee Her rights as mortgagee are intact under the alienations. In these circumstances, there are no merits in the second appeals. They are dismissed. There will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

R. Subbnraman .... *Petitioner**

v.

Venkatarajulu Naidu ... *Respondent*

Tamil Nadu Debt Relief Act (XXXI of 1976), section 3 (k)—*"Rural Artisan"—Definition of — Homeopathy practitioner, if a rural artisan—Suit on basis of promissory note against homeopathy doctor—Plea of being entitled to the benefits of the Act, if tenable.*

From the definition of 'rural artisan' in section 3 (*k*) of Tamil Nadu Debt Relief Act (XXXI of 1976) it is seen that the rural artisan is one (1) who should not own agricultural land, (2) his annual household income should not exceed two thousand and four hundred rupees, (3) his principal means of livelihood is production or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto, (4) he must earn his livelihood by practising any craft either by his own labour or by the labour of the members of his family in any rural area. All these things, taken together, show that the 'rural artisan' is one who turns out something by way of his product out of his own skill. A homeopathy doctor cannot be said to be a rural artisan. [*Para.* 4.]

Cases referred to:—

Punnavanam v. *Muthuswami*, (1962) 2 M L. J. 259 : I. L. R. (1962) Mad. 1171 : 75 L. W. 338 : A. I. R. 1962 Mad. 444.

*C. R. P. No. 2246 of 1980.
18th December, 1981.

Petition under sections 96 and 115 of the Civil Procedure Code, praying the High Court to revise the Decree of the Court of the Principal District Munsif, Dindigul, dated 27th November, 1979 and made in O. S. No. 1005 of 1978.

M. A. Ghatala and *Mateengatala*, for Petitioner.

B. S. Gnanadesikan, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is filed against the judgment of the Principal District Munsif, Dindigul, in O. S. No. 1005 of 1978 granting a decree in favour of the plaintiff for recovery of a sum of Rs. 1,250-50 from the defendant.

2. The suit was filed on the basis of a promissory note executed by the revision petitioner in favour of the respondent for a sum of Rs. 1,000. Before the lower Court, the plea of the revision petitioner was that he was compelled to execute the suit promissory note. that the promissory note was not supported by consideration and that a sum of Rs. 489 was due from the respondent to him and in any event, he was a rural artisan entitled to the benefits of Tamil Nadu Debt Relief Act (Act XXXI of 1976) (hereinafter referred to as the Act). The lower Court after considering the evidence let in by both sides, came to the conclusion that the promissory note is supported by consideration and that the revision petitioner is not entitled to the benefits of the Act, but found the case of the revision petitioner that a sum of Rs. 489 is due from the respondent to be true and deducted the same from the suit claim and passed a deree for the balance. Aggrieved by this judgment, the revision petitioner had filed this revision

3. The first contention urged on behalf of the revision petitioner is that the suit promissory note is not supported by consideration and that he was forced to execute the same and as such the lower Court ought not to have held that the promissory note is supported by consideration. The lower Court after considering the evidence and the circumstances of the case and mainly relying upon the fact no complaint regarding the

alleged coercion by the respondent herein was made before any authority, believed the case of the respondent and came to the conclusion that the promissory note is supported by consideration. The appreciation of the evidence by the lower court cannot be said to be perverse and hence this plea of the revision petitioner cannot be entertained.

4. The next contention of the revision petitioner is that he being a medical practitioner in homeopathy, he is a rural artisan as defined in section 3 (*k*) of the Act (XXXI of 1976) and as such no suit can be filed against him. The argument of the learned counsel for the revision petitioner is that a homeopathy practitioner is one who prepares medicine by manual labour and administers it to his patients and as such, he can only be construed as a rural artisan. Section 3 (*k*) of the Act reads as follows:

> " 'rural artisan' means a person who does not hold, whether as owner, tenant or mortgagee with possession, or partly in one capacity and partly in another any agricultural land and whose annual household income does not exceed two thousand and four hundred rupees, and
>
> (*i*) whose principal means of livelihood is production or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto, or
>
> (*ii*) who normally earns his livelihood by practising any craft either by his own labour or by the labour of the members of his family in any rural area".

From the above definition, it is seen that the rural artisan is (1) who should not own agricultural land, (2) his annual household income should not exceed two thousand and four hundred rupees, (3) his principal means of livelihood is production or repair of traditional tools, implements and other articles or things used for agriculture or purposes ancillary thereto, (4) He must earn his livelihood by practising any craft either by his own labour or by his labour of the members of his family in any rural area. As per the explanation, "rural area" means any area not being the City of Madras or the City of Madurai or the area comprised in a municipal town or a township constituted under any law for the time being in force. The argument of the learned counsel for the revision petitioner is a person who earns his livelihood by practising a craft by his own labour. The practising of the craft according to him is administering homeopathy medicines to the petitioner. The question is whether a homeopathy practitioner can be said to be a person practising any craft. The meaning given to the word 'craft' in the concise Oxford Dictionary is skill, cunning, deceit, art, trade; the meaning given to the word 'craftsman' is one who practises a craft. From a reading of the entire section, the craft can be said to qualify rural artisan or one engaged in the nature of work pertaining to rural artisan. In Stroud's Judicial Dictionary, the word 'artisan' is defined. The meaning given is the same as one for 'artificer'. The artificer is defined as skilled workman *i e*., one who makes something as distinguished from one who only does something. For example, a hairdresser is not an artificer, because he only does something. A designer of patterns for a calico-printer was held to be an artificer. The following quotations from as English case is also extracted in Stroud's Judicial Dictionary :

> "I cannot conceive that the word 'artificer' only applies to persons engaged in such occupations as require merely *manual labour*. The party who makes this application to the Court, himself states that he is a 'pattern designer,' a person in fact who makes the drawing of the pattern, which is then engraved on the printing rollers, and, subsequently, transferred in colours to the fabric itself. He is therefore the party who sets all in motion. He contributes in the most material degree to the printing of calico, and may therefore, I think, be properly included under the term 'artificer."

Taking all these things together, we can only come to the conclusion that the rural artisan is one who turns out something by way of his product out of his own skill. In the case reported in *Punnavanam* v. *Muthuswami*[1], the

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1 (1962) 2 M.L. J. 259 : 75 L. W.: 338 : I. L. R. (1962) Mad. 1171 : A. I. R. 1962 Mad. 444.

scope of the word 'artisan' was considered and this Court came to the conclusion that the instruments of a doctor or surgeon cannot be said to be the tools of an artisan and that a doctor fell outside the classification of artisan because unlike a handicraftsman he did not make things for sale as part of his trade or calling. Applying the same principle to the facts of the present case, a homeopathy doctor cannot be said to be a rural artisan. Hence the plea of the revision petitioner that he is entitled to protection under the Act will have to be negatived.

5. The next contention of the revision-petitioner is that though a sum of Rs. 489 was found to be due to him by the respondent, cost was not awarded to him in his counter-claim. This contention of the revision-petitioner is well-founded and since costs follow the event, the revision-petitioner is entitled to costs in the counter-claim. Hence the civil revision petition is partly allowed and the revision petitioner is entitled to costs in respect of the counter claim and in other respects, the judgment of the Court below is confirmed. There will be no order as to costs in this civil revision petition.

R. S. —— *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Padmanabhan, J.*

The Management of Tractors and Farm Equipments Ltd. ... *Petitioners**

v.

The Presiding Officer, 1st Additional Labour Court and T. A. Doss ... *Respondents.*

(A) *Tamil Nadu Prohibition Act (X of 1937)—Consumption of liquor by employee—Conviction under the Act—Whether amounts to an offence involving moral turpitude.*

*W. P. No. 623 of 1980. 15*th September*, 1982.

(B) *Industrial Disputes Act (XIV of 1947), section 2 (4)—'Workman', definition of—Person working regularly in a work of permanent nature—Not a casual worker.*

(C) *Words and Phrases—"Moral Turpitude".*

The short question for consideration in the instant writ petition was whether a conviction for consumption of liquor under the provisions of the Tamil Nadu Prohibition Act will amount to a conviction for an offence involving moral turpitude.

Every Act that is punishable in law would not amount to an offence involving moral turpitude. If that had been the intention, then there is no necessity at all for statutes to say that a person convicted of an offence involving moral turpitude would be exposed to certain consequences, or disqualifications. The question whether conviction for a particular offence involves moral turpitude will depend upon the facts and circumstances of the case. However, in order to come within the scope of the phrase "moral turpitude" there must be an element of baseness and depravity in the act for which a particular individual has been punished. The act must be vile and harmful to society in general or contrary to accepted rules of rights and duties between man and man. Mere violation of a particular statute cannot amount to commission of an act, involving moral turpitude. [*Para.* 16.]

The following tests can be adopted to ascertain whether the concerned act constitutes an offence involving moral turpitude: (1) Whether the act leading to a conviction was such as could shock the moral conscience or society in general?; (2) Whether the motive which led to the act was a base one?; and (3) Whether on account of the act having been committed the perpetrator could be considered to be of a deprived character or a person who was to be looked down upon by the society. Tested in the light of the above principles, the punishment of an individual for consuming liquor without a permit in violation of the provisions of the Prohibition Act cannot be said to be an offence involving moral turpitude. It cannot be said that the drinking

is considered by society to be so base or vile as to characterise a man who consumes liquor as one of depraved character or as one who is to be looked down upon by society. Further, the Prohibition Act itself provides for permit to be granted by the State Government under certain circumstances. The question whether consumption of alcoholic liquor by itself makes a man to be ostracized by society on the ground that he is a man of depraved character has to be decided, not on the basis of prohibition law prevalent in a particular State but on the basis of the situation in the country as a whole. No doubt, in the State of Tamil Nadu, there is a Prohibition Act which at the relevant time was more stringent than what it is today. At the same time, there are States in India where there is no prohibition at all. Drinking as such is not considered harmful to society in general or contrary to accepted rules of rights and duties between men and men. Conviction for an offence for consumption of liquor under the Prohibition Act does not amount to an act involving moral turpitude [*Para.* 16.]

In this case, the management manufactured Tractors and the Tractors are being loaded into the railway wagons. For the said purpose, the second respondent and others were being regularly employed by the management. The work which the second respondent was doing in general was of a permanent nature and his claim that he was being regularly employed had not been derned. Hence the second respondent is a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act. [*Para.* 22.]

Cases referred to:—

Punjab National Bank Limited v. *Megh Singh Chowkidar*, (1957) 2 L. L. J. 290 ; *Sahiram* v. *Rajasthan State*, A. I. R. 1957 Raj. 27 ; *Baleswar Singh* v. *District Magistrate and Collector*, A. I. R. 1959 All. 71 ; *Mangali* v. *Chhaki Lal*, A. I. R. 1963 All. 527 ; *Risal Singh* v. *Chandgi Ram*, A. I. R. 1966 Punj. 393 ; *Jaysingh Rangarao Raut* v. *Maharashtra State Electricity Board*, (1989) 1 L. L. J 117 ; *Crompton Enigineering Company* v. *Additional Labour Court, Madras*, (1975) 1 L. L. J. 207 : (1975) Lab. I. C. 1006 : (1975) 2 M. L. J. 118 : 88 L. W. 74 ; *Calicut Mordum Spinning and Weaving Mills* v. *Industrial Tribunal*, (1977) Lab. I. C. 1673 : (1977) K. L. T. 688 ; *Y. L. Agarwala* v. *Tozhilali Union*, (1978) Lab. I. C. 1264 : (1978) 2 S. C. J. 657 : (1978) 2 I. T. J. 523 : A. I. R. 1978 S. C. 1412.

King and Partridge, for Petitioner.

Ayyar and Dolia, for Respondent.

The Court delivered the following

JUDGMENT.—The short question that arises for consideration in this writ petition is whether a conviction for consumption of liquor under the provisions of the Tamil Nadu Prohibition Act will amount to a conviction for an offence involving moral turpitude. The facts may be stated as follows: The petitioner is the management of Tractors and Farm Equipment Ltd., Madras. The second respondent, Doss, was an employee under the management on a monthly remuneration of Rs. 260. According to the management, the second respondent was engaged under a contract basis along with others to load tractors manufactured by the management on the railway wagons at Korukkupet railway yard as and when railway wagons are available. While so, the management came to know that the second respondent was said to have been arrested for consuming liquor on 1st February, 1976, and he was ordered to pay a fine of Rs. 60 by the Magistrate. Between 1st February, 1976 and 16th February, 1976, he did not turn up for work. On 17th February, 1976, when the second respondent turned up for work the management refused to entertain him. It is the case of the management that the conviction was for an offence involving moral turpitude and therefore, when the second respondent turned up for work on 17th February, 1976, he was not allowed to do any work. Thereupon, at his instance an industrial dispute was raised regarding the non-employment of the second respondent. The First Additional Labour Court, Madras, found that the punishment under a prohibition case would not involve any moral turpitude and consequently the non-employment of the 2nd respondent was not justified. The management furthes contended before the Labour Court that the second respondent was not a workman within the meaning of the Industrial Disputes Act and that consequently the second respondent could not be granted the relief of reinstatement. The latter objection was also overruled by the Labour Court and it ordered the

second respondent to be reinstated with all back wages and attendant benefits. Hence this writ petition.

2. Mr. Sanjay Mohan, the learned counsel for the petitioner urged two contentions. Firstly, the conviction for the offence of consumption of liquor under the Tamil Nadu Prohibition Act would involve moral turpitude. The second respondent having been so convicted was liable to be removed from service, under the model standing orders which are the standing orders applicable to the management. Secondly, the second respondent was only employed on a contract basis for the purpose of loading the tractors manufactured by the management into the railway wagon as and when available. There is no master and servant relationship between the management and the second respondent. The second respondent therefore, cannot claim to be a workman within the meaning of the Industrial Disputes Act. In the circumstances, the Labour Court committed an error in directing reinstatement of the second respondent with all back wages and attendant benefits.

3. Mr. Venkataraman, the learned counsel for the second respondent repudiated both the contentions of Mr. Sanjay Mohan. Mr. Venkataraman argued that the second respondent was a workman under the management and that the Labour Court had also clearly found that the second respondent was a workman under the management within the meaning of the Industrial Disputes Act. The learned counsel further urged that the management did not plead that the model standing orders applied to it, and that it was only at the stage of argument before this Court that resort was being made to the model standing orders. The learned counsel further contended that the offence of consumption of liquor without a permit under the provisions of the Tamil Nadu Prohibition Act would not constitute an offence involving moral turpitude and consequently the termination of the services of the second respondent was not justified.

4. I shall first take up for consideration the question whether the second respondent has been convicted for an offence involving moral turpitude. In the claim statement filed by the management before the Labour Court, the management has specifically pleaded that the conviction of the second respondent before the criminal court was in respect of an offence under the Prohibition Act and that conviction amounted to an offence involving moral turpitude. No doubt, there is no reference to the model standing orders in the counter-statement. It is also true that there is no reference to the model standing orders in the affidavit filed in support of the writ petition. Under the Industrial Employment (Standing Orders) Act, 1946, in the absence of there being certified standing orders for an industrial establishment, the model standing orders shall be deemed to be adopted in the establishments. In the circumstances, since there are not certified standing orders applicable to the management, the model standing orders must be deemed to have been adopted by the management. Standing Order. 16 (*x*) of the Model Standing Orders states as follows:

> "The following acts and omissions shall be treated as misconduct:—conviction by a court of law for any criminal offence involving moral turpitude".

The management has specifically pleaded in their counter-statement, as already stated, that the second respondent has been convicted for an offence involving moral turpitude. That being the case, the contention must be related to Order 16 (*x*) of the Model Standing Orders. In the circumstances, the failure to make a specific reference to the model standing order in the counter-statement or in the affidavit filed in support of the writ petition, in my opinion, is not fatal to the case of the management.

5. In support of his plea Mr. Sanjay Mohan relied on certain decisions. The first decision is that of the Labour Appellate Tribunal of India at Calcutta in *Punjab National Bank Ltd.* v. *Megh Singh Chowkidar*[1]. Mr. Sanjay Mohan cited this decision only to support his contention that a conviction under the Prohibition Act would mean a conviction for an offence involving moral turpitude and not as a precedent which is binding on this Court.

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1. (1957) 2 L. L. J. 290.

In that case a chowkidar employed in the Punjab National Bank Ltd., was found intoxicated as a result of heavy drinking of liquor and was arrested by the police. He pleaded guilty before the Magistrate and was sentenced to pay a fine of Rs. 25. Since an industrial dispute was pending the bank sought the permission of the Labour Court for permission to dismiss the chowkidar on the ground that he had been convicted of a criminal offence involving moral turpitude. Section 10 (*h*) (*i*) of the Banking Companies Act stated that :

> "No banking company shall employ any person who is or at any time has been adjudged insolvent and has suspended payment or has compounded with his creditors or who is or has been convicted of a criminal offence involving moral turpitude."

The Tribunal held that if by a law in force in the State in which the particular employee is for the time being employed, drinking of liquor is made a criminal offence and the employee is convicted of such offence, it would be no answer to say that he should not be held to be guilty of an offence involving moral turpitude simply because the laws of some other States, in which the bank has other branches, do not make drinking a criminal offence.

6. The next case relied upon by the learned counsel is *Sahiram* v. *Rajasthan State*[1]. There a person was convicted for evading customs duty under the Customs Act. It was held that a person who evaded customs duty must be held to be guilty of an offence involving moral turpitude.

7. In *Baleswar Singh* v. *District Magistrate and Collector*[2], the meaning of moral turpitude came up for consideration. Section 5-A (*h*) of the Uttar Pradesh Panchayats Raj Act, 1947, contained a provision for disqualification of a person being chosen or appointed as a Nyaya Panch if the person has been convicted of any offence involving moral turpitude. One Baijnath Singh had been convicted for an offence under section 82, Indian Penal Code and 107, Criminal Procedure Code and consequently, his appointment as a Nyaya Panch was challenged before the Allahabad High Court. Section 182, Indian Penal Code, dealt with the offence of a public servant giving any false information which he knows or believes to be false intending thereby to cause or knowing it to be likely that he would thereby cause such public servant to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which information is given were known to him; or to use lawful power of such public servant to the injury or annoyance of any person. It is in that context, a learned single Judge of the Allahabad High Court was called upon to consider what would amount to an offence involving moral turpitude. The learned Judge observed as follows :

> "The expression 'moral turpitude' is not defined anywhere. But, it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore, the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to act and he still acts contrary to it and does to knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man...A duty has been cast on individuals not to act in a certain manner and divert public servants from their normal course. This is a duty which every individual who is governed by the above law owes to the society whose servant every public servant obviously is. An individual's conduct in giving false information to a public servant in the circumstances stated in section 182 (*a*) too is therefore, contrary to justice, honesty and good morals and shows depravity of character and wickedness."

1. A. I. R. 1957 Raj. 27.
2. A. I. R. 1959 All. 71.

In this view, the learned Judge held that Baijnath Singh had been convicted for an offence involving moral turpitude and was disqualified to be appointed as Nyaya Panch.

8. As against this Mr. Venkataraman cited the decision of Ramaswami Gounder, J., sitting as an Industrial Tribunal in an award passed on 26th April, 1961 in *Chinnu* v. *Salem Dharmapuri Union Motor Services (P.) Limited*[1]. Before the Tribunal it was contended on behalf of the management that violation of the Prohibition Law was an offence involving moral turpitude and in such a case, the management would be justified in dismissing the worker from service. The Tribunal held that:

> "It was not sure whether more consumption of liquor necessarily involves any element of moral turpitude, as if the prohibition law was enacted on moral grounds. Millions of people consume liquor all over the world, many of them eminent men in all walks of life, statesmen, poets, philosophers and so on, many even to the point of intoxication, and can it be said that all such persons fall short of moral standards by the consumption of liquor. In the Tribunal's opinion, the management was not concerned with the private life or morals of the workers and that only if it affected the efficiency or the discipline of the worker or if the worker turned up for work in a drunken state, the management might be justified in taking action".

In *Mangali* v. *Chhakki Lal*[2], Srivastava, J., after extracting the observation of Tandon, J in *Baleswar Singh* v. *District Magistrate*[3], observed as follows:

> "With great respect, it appears to me that some of the observations made in these decisions have been too widely stated, and if followed literally, may make every act punishable in law an offence involving moral turpitude. That, however, could not be the intention with which those observations were made. From a consideration of the dictionary meaning of the words 'moral' and turpitude' as well as the real *ratio decidendi* of the cases, the principle which emerges appears to be that the question whether a certain offence involves moral turpitude or not will necessarily depend on the circumstances in which the offence is committed; it is not every punishable act that can be considered to be an offence involving moral turpitude. Had that been so, the qualification involving moral turpitude, would not have been used by the Legislature and it would have disqualified every person who had been convicted of the offence. The tests which should ordinarily be applied for judging whether a certain offence does not involve moral turpitude appear to be: (1) whether the act leading to a conviction was such as could shock the moral conscience of society in general, (2) whether the motive which led to the act was a base one, and (3) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society. No absolute' standard can be laid down for deciding whether a particular act is to be considered one involving moral turpitude, but the above are the general tests which should be applied and which should in most cases be sufficient for enabling one to arrive at a correct conclusion on the question."

In that case, a person belonging to the district of Etawah where there was no prohibition against taking bhang was found in possession of bhang in another district in which there was prohibition, and he was found guilty under section 60 (*a*) of the Excise Act. In such circumstances, the learned Judge held that the conviction could not be considered to be in respect of an offence involving moral turpitude.

10. The next case cited by Mr. Venkataraman was the decision of the Punjab High Court in *Risal Singh* v. *Chandgi Ram*[1]. The question was whether a conviction under section 19 *(f)* of the Arms Act amounted to a conviction involving moral turpitude. The learned Judges applied the test laid down by

1. Published in Fort St. George Gazette, dated 26th April, 1961, Part II, Section I (Supplement), page 8.
2. A.I. R. 1963 All. 527.
3 A. I. R. 1959 All. 71.

1. A. I. R. 1966 Punj. 393.

Srivastava, J. in *Mangali* v. *Chhakki Lal*[1], and held that the offence of being in possession of unlicensed revolver implies no depravity or wickedness of character or disposition which would involve any moral turpitude.

11. Mr. Venkataraman then cited the decision of the Bombay High Court in *Jaysing Rangarao Raut* v. *Maharashtra State Electricity Board*[2]. An employee of the Maharashtra Electricity Board was convicted for an offence under sections 149 and 341, Indian Penal Code. Regulations of the Board empowered the Board to terminate the services of an employee on account of conviction of the employee in criminal Court for an offence involving moral turpitude. The employee was found guilty under section 147, Indian Penal Code, since he was a member of an unlawful assembly which surrounded a jeep in which some engineers of the Board were travelling. He was convicted under section 341, Indian Penal Code, for wrongful restraint. The learned Judge observed as follows :

> "Can it be said that this action of the petitioner for which be has been convicted constitutes an offence involving moral turpitude? The term 'moral turpitude' by its very nature is somewhat nebulous, because it involves an examination of an action in the light of the prevailing moral norms. Unlike legal norms, moral norms are somewhat nebulous. They can vary from time to time, from society to society and even from individual to individual. Hence it is quite possible that an action which may be violative of moral norms in one society may appear acceptable to another society. Hence one can only judge the action in any given case in the light of what one considers to be the prevailing moral norms of the society in which such an action has taken place. Secondly, the action should not merely be contrary to moral norms, but it should involve a violation of the moral code in such a manner that it indicates baseness or depravity of character."

1. A. I. R. 1963 All. 527.
2. (1980) 1 L. L. J. 117.

On a consideration of the various decisions cited before me I am inclined to accept the test laid down by Srivastava, J., in *Mangali* v. *Chhakki Lal*[1].

12. I shall now refer to the meaning given to the word 'moral turpitude' in the various dictionaries. In Black's Law Dictionary, Fifth Edition, at page 910 moral turpitude is explained thus :

> "*Moral turpitude.*—The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow men or to society in general, contrary to accepted and customary rule of right and duty between man and man:"

Turpitude is explained at page 1359 thus :

> "*Turpitude.*—In its ordinary sense, inherent baseness or vileness of principle or action; shameful, wickedness, depravity. In its legal sense, everything done contrary to justice, honesty, modesty or good morals. An action showing gross depravity.

13. 'Moral' is explained in the Random House Dictionary of the English Language, College Edition, thus :

> "*Moral.*—of pertaining to or concerned with right conduct or its principles. Being in accordance with such principles. Conforming to these principles rather than to law, custom, etc."

Turpitude is stated to mean baseness or depravity. A base or depraved act.

14. In Words and Phrases. Permanent Edition, Vol. 27, Page 556, it is stated thus :

> "Moral turpitude is defined as an act of baseness, vileness or depravity in private and social duties owing to fellowmen of society in general, contrary to accepted and customary rules. Moral turpitude is an act of baseness, villainy, or depravity in the private social duties which a man owes to his fellowmen or to society in general,

1. A. I. R. 1963 All. 527.

contrary to the accepted and customary rule of right and duty between man and man. The words involving moral turpitude as used in the law with reference to crimes, refer to conduct which is inherently base, vile, or depraved, contrary to accepted rules of morality, whether it is or is not punishable as a crime, they do not refer to conduct which, before it was made punishable as a crime, was not generally regarded as wrong or corrupt. 'Turpitude' is defined as inherent baseness or vileness of principle, words or actions, or shameful wickedness or depravity, whereas 'moral' describes conduct that conforms to the generally accepted rules which society recognizes should govern everyone in his social and commercial relations with others, regardless of whether those rules constitute legal obligations, so that moral turpitude' implies something in itself whether punishable by law or not, the word 'moral' serving only to emphasize the nature of the wrong committed "

At page 565 the following passage is found :

"Conviction for violation of the Prohibition Law is not such conviction of crime as involves moral turpitude."

At page 566 it is found :

"The illegal sale of intoxicating liquors is not a crime involving moral turpitude within Kirby's Dig. authorizing the revocation of a physician's license on his conviction of crime involving moral turpitude; the words 'moral turpitude' implying something immoral, regardless of the fact that it is punishable by law, and offences against the liquor laws, such as illegal sales of liquor, are statutory crimes and merely *mala prohibita*".

15. In Ramanatha Aiyar's Law Lexicon, 1940 Edition at page 832 it is stated thus:

"*Moral turpitude.*—Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowman or to society in general contrary to the accepted and customary rule of right and duty between man and man.

16. From the above it is clear that every act punishable in law would not amount to an offence involving moral turpitude. If that had been the intention, then there is no necessity at all for statutes to say that a person convicted of an offence involving moral turpitude would be exposed to certain consequences or disqualification. The Legislature would have merely stated that a person who is punished for violation of any law would be exposed to such consequences, or disqualification. The question whether conviction for a particular offence involves moral turpitude will depend upon the facts and circumstances of the case. However, in order to come within the scope of the phrase 'moral turpitude' there must be an element of baseness and depravity in the act for which a particular individual has been punished. The act must be vile or harmful to society in general or contrary to accepted rules of right and duties between man and man. Mere violation of a particular statute cannot amount to the commission of an act involving moral turpitude. I am in complete agreement with Srivastava, J. of the Allahabad High Court in *Mangali* v. *Chhakki Lal*[1], who has laid down the following tests : (1) Whether the act leading to a conviction was such as could shock the moral conscience or society in general?; (2) whether the motive which led to the act was a base one? ; and (3) whether on account of the act having been committed the perpetrator could be considered to be of or depraved character or a person who was to be looked down upon by the society?. Tested in the light of the above principles, the punishment of an individual for consuming liquor without permit in violation of the provisions of the Prohibition Act cannot be said to be an offence involving moral turpitude. it cannot be said that drinking is considered by society to be so base or vile as to characterise a man who consumes liquor as one of depraved character or as one who is to be looked down upon by society. Further, Prohibition Act itself provides permit to be granted by the State Government under certain circumstances. The question whether consumption of alcoholic liquor by itself makes a man to be ostracized by society on the ground that he is a man of depraved character has to be decided, in my opinion, not on the basis of a

1. A.I.R. 1963 All. 527.

prohibition law prevalent in a particular State but on the basis of the situation in the country as a whole. No doubt, in the State of Tamil Nadu, there is a Prohibition Act which at the relevant time was more stringent than what it is today. At the same time, there are States in India where there is no prohibition, at all. I am emphasising this aspect only to show that drinking as such is not considered as harmful to society in general or contrary to accepted rules of rights and duties between men and men. I am therefore, of the view that conviction for an offence for consumption of liquor under the Prohibition Act does not amount to an offence involving moral turpitude.

17. Further, on the facts of this case it has also to be noted, there is absolutely no evidence as to the circumstances in which the second respondent was arrested for a violation of the provisions of the Prohibition Act. No doubt, it is not disputed that the second respondent pleaded guilty before a Magistrate for the offence of consuming liquor. That apart, there is nothing else to show the place where the second respondent was arrested and whether he was found drunk in a public place. While the case of the second respondent is that he was picked up from his house and a case under the Prohibition Act was foisted on him and he was forced to plead guilty, the petitioner's case is that the second respondent was really arrested for violation of the provisions of the Prohibition Act for having consumed liquor without a permit. No order of conviction or any record relating to the criminal case has been filed in this case.

18. Apart from this, it is significant to state that Standing Order 16 (*x*) of the Model Standing Orders is not attracted to the facts of this case. The finding of the Labour Court in this respect is not liable to be interfered with.

19. The next question that arises for consideration is whether the second respondent is a workman within the meaning of the Industrial Disputes Act. The case of the management is, the second respondent was only a casual employee. He was engaged along with others for the purpose of loading the tractors into railway wagons as and when wagons are available. In the circumstances, the contention of Mr. Sanjay Mohan was that the second respondent was not a workman within the meaning of the Industrial Disputes Act and would not be entitled to reinstatement. The learned counsel also stressed upon the fact that the Labour Court had not given any finding in the case whether the second respondent was a casual employee or not. In this context, the learned counsel referred to the decision of Ismail, J. (as he then was), in *Crompton Engineering Company* v. *Additional Labour Court, Madras*[1]., In this case the services of three persons were terminated by the Crompton Engineering Co. Ltd., and at their instance an industrial dispute regarding their non-employment was raised for adjudication. It was contended before the Labour Court by the management that the said persons were only causal labourers and therefore, were not workmen within the meaning of section 2 (*s*) of the Industrial Disputes Act. The Labour Court held that even casual labourers were included in the definition of section 2 (*s*) of the Industrial Disputes Act and directed the reinstatement of the employees. Before Ismail, J. (as he then was), the question that was argued was whether causal labourers would be workmen within the meaning of section 2 (*s*) of the Act. The learned Judge factually found that the orders of appointment of the concerned employees established that they were appointed only for a particular period or for a particular job, and as soon as the period or job was over the appointment automatically came to an end and that the said position was not disputed, before the Court. On the basis of this factual finding, the learned Judge observed as follows:

> "Under these circumstances, even though the respondents 2 to 4 would come within the scope of the term 'workman' in section 3 (*s*) of the Industrial Disputes Act, they would not be entitled to reinstatement as ordered by the Labour Court since there was no question of termination of their services or discharge of the workmen concerned as their employment itself was for a particular period or for a particular job and

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1. (1975) 1 L. L. J. 207 : (1975) Lab. I. C. 1006 : (1975) 2 M. L. J. 118 : 88 L. W. 74.

such employment came to an end automatically as soon as the term was over or the job was over."

The decision of Ismail, J. (as he then was) is therefore, not an authority for the proposition that a casual labourer will not fall within the scope of the term 'workman' in section 2 (*s*) of the Industrial Disputes Act. The facts of that case are clearly distinguishable from the facts of this case.

20. Mr. Venkataraman cited the decision of the Kerala High Court in *Calicut Mordam Spg. & Wvg. Mills* v. *Industrial Tribunal*[1]. The dispute arose on account of the denial of employment to six persons by the management of the Calicut Mordam Spg. and Wvg. Mills, Chelambra. The management contended that the work which the persons were doing was a work which was available only on a casual basis. The management used to call the said persons only when they had enough work and the work would be available only when lorries came with raw materials. It was further contended by the management that the workmen were casual labourers and hence not liable to be reinstated. The judgment of Ismail, J. (as he then was), was relied upon by the management. The learned Judges felt that in the case before them the Tribunal had found that the work of loading and unloading the lorries was work of a permanent nature although it might not have been available for being undertaken by itself in sufficient frequency or volume to keep the workmen permanently employed and that by itself would not make the work one of a casual nature, nor the workmen casual workmen. In this view, the learned Judges came to the conclusion that there was no foundation on the facts before them to apply the decision of Ismail, J.

21. Mr. Venkataraman also cited the decision of the Supreme Court in *Y. L. Agarwala* v. *Tozhilali Union*[2], the headnote of which reads as follows:

"Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, it is found, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor."

22. In the case before me, the Labour Court has factually found that second respondent was workman within the definition of the Industrial Disputes Act. The Labour Court has referred to Exhibit M-1, the attendance register wherein the name of the second respondent finds a place. The Labour Court has also observed that Exhibit M-1 showed the regularity of employment or control which the management exercised over persons like the second respondent who are being engaged for loading tractors into railway wagons. The Labour Court has referred to the evidence of M. W. 1 wherein he has stated that he used to load 15 to 40 tractors every day and when there was no work for him he could not attend to the work of some other management. The Labour Court also referred to the evidence of M. W. 1, Krishnamurthy, a clerk in the management working at the Korukkupet yard, M. W. 1 has stated that if the workmen like the second respondent were not able to attend to the work they should send a substitute and in the attendance register the letter '*R*' would be written to show that he was a replacement, and that the wages should be paid to the person replaced by the particular employee. M. W. 1 had also stated that the second respondent and others similarly situated had to report for work every day and that he would supervise their work and correct them in the workspot if the work was not done properly. Everyday he would allot work for them and even though tractors did not arrive, they had to wait for the same. The

1. (1977) Lab. I. C. 1673 : (1977) K. L. T. 688 : (1977) I. L. R. 2 Ker. 152.
2. (1978) Lab. I. C. 1264 (S. C.) : (1978) 2 S. C. J. 657 : (1978) 2 I. T. J. 523 ; 1978 Tax. L. R. 995 : 1978) 3 S. C. C. 426 : 114 I. T. R. 471 : A. I. R. 1978 S. C. 1412.

Labour Court has further stated that the evidence given by M. W. 1, clearly established the fact that the management of the respondent company had got absolute control over the work of the workman and they supervised the work of the workman in respect of loading of the tractors and there was a regular attendance register. On these facts, the Labour Court came to the conclusion, that the second respondent was a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act. Mr. Sanjay Mohan was not able to convince me on the basis of the relevant records that this finding of the Labour Court was either perverse or not based on any material or vitiated by any error apparent on the face of the record. Apart from this, unlike the facts in the case that arose for consideration before Ismail, J. (as he then was), *Crompton Engg. Company* v. *Additional Labour Court, Madras*[1], the facts of this case are similar to the facts which arose for consideration before the Kerala High Court in *Calicut Mordum Spg. and Wvg. Mills* v. *Industrial Tribunal*[2]. Admittedly, in this case, the management manufactures tractors and the tractors are being loaded into the railway wagons. For the said purpose, the second respondent and others were being regularly employed by the management. In the claim statement, it is stated that:

> "The work that the second respondent was performing was and continued to be of a permanent nature. Loading of tractors is an absolute necessity in the day to day operations of the respondent-company and forms part of the manufacturing operations of the respondent-company. The assembled tractors are loaded for despatch to the various destinations both by rail and road transport and everyday the claimant had to stay late in the evening awaiting the assembled tractors from the factory, if on the previous day all tractors had been loaded and no tractors became available for despatch".

In the counter statement, it is stated:

> "A reference to the nature of work and the activities carried on by the respondent-management as submitted above is irrelevant since the petitioner's name has been removed from the list of casual employees."

1. (1975) L. L. J. 207 : (1975) Lab I. C. 1006.
2. (1977) Lab. I. C. 1673 : (1977) K. L T. 688.

It must therefore, be taken to be admitted that the work in which the second respondent was being engaged was of a permanent nature and that his claim that he was being regularly employed has not been denied. Consequently, the case clearly falls within the ratio of the decision in *Calicut Mordum Spg. & Wvg. Mills* v. *Industrial Tribunal*[1]. I am therefore, convinced on the materials placed before me that the second respondent is a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act. The order of the Labour Court cannot therefore, be said to be vitiated in any manner. The writ petition therefore, fails and is dismissed, but in the circumstances there will be no order as to costs.

R. S. —— *Writ petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam. J.*

V. N. Chandravadivelu Chetty ... *Petitioner**

v.

The Secretary to Government, Revenue Department, Fort. St. George, Madras-9 and two others ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), section 6 (12) (i)—*Petitioner advancing money to salvage property from the clutches of an earlier creditor who wanted to bring the property to sale by public auction—Money so advanced whether can be treated as a purchase price.*

Held: In this case, there is no question of any purchase of the property by the debtor nor the amount advanced to him by the petitioner representing a portion of the purchase

1. (1977) Lab. I. C. 1673 : (1977) K. L. T. 688.

*W. P. No. 3286 of 1981. *1st February,* 1982.

price. The exemption under section 12 of Act XIII of 1980 will apply only if the full or a portion of the purchase price payable by the debtor is retained by him and not in a case where the debtor borrowed for safeguarding his property or saving the property from being sold in Court-auction. The debtor in this case cannot come within the exemption provided in section 12 (*i*). [*Para.* 3.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of declaration calling for the records in proceedings No. N. K. 7/81, May, 81 pending before the 2nd respondent filed by the 3rd respondent, against petitioner by declaring the provisions relating to secured debts in the Tamil Nadu Act XIII of 1980 as amended by Act X of 1981 published by the 1st respondent as *ultra vires* of the Constitution in so far as the petitioner is concerned.

A. Subrahmanya Iyer, for Petitioner.

S. Jagadeesan, for Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner herein advanced a sum of Rs. 3,000 to the 3rd respondent on a mortgage of his property. In respect of that debt, the 3rd respondent filed an application before the Special Tahsildar (Debt Relief), Chengalpattu, claiming the benefits under section 6 of Tamil Nadu Act XIII of 1980 and also a certificate of discharge in relation to the said mortgage debt. It is at this stage that the petitioner, who is the creditor, has approachsd this Court for the issue of a writ of declaration declaring Tamil Nadu Act XIII of 1980 as unconstitutional. The validity of the Act has been upheld already by a Division Bench of this Court in W. P. No. 6351 of 1980, etc., batch (Judgment, dated 10th December, 1981).

2. Taking note of the fact that the validity of the Act has been upheld by this Court, the learned counsel for the petitioner contends that the mortgage debt in this case is a debt exempted from the provisions of the Act under section 12 (*i*). Section 12 (*i*) is as follows :—

"Nothing in this Act shall apply to the following categories of debts and liabilities of a debtor, namely:—

... ...

(*i*) any debt which represents the price of property, whether movable or immovable purchased by a debtor or any amount due under a hire purchase agreement."

3. According to the learned counsel for the petitioner, the sum of Rs. 3,000 advanced by him was to salvage the property from the clutches of an earlier creditor who wanted to bring the property to sale in Court-auction and but for his advancing the sum of Rs. 3,000 as loan the entire property would have been lost to the debtor and therefore, the sum of Rs. 3,000 advanced by him, though on a mortgage of the 3rd respondent's property, should be taken to be purchase price as contemplated by section 12 (1). Even assuming that the loan advanced by the petitioner to the 3rd respondent was to save the property from being sold in Court-auction at the instance of an earlier creditor, still we do not see how it can be treated as purchase price of the property. In this case, there is no question of any purchase of the property by the debtor and the amount advanced to him by the petitioner representing a portion of the purchase price. The above clause of exemption will apply only if the full or a portion of the purchase price payable by the debtor is retained by him and not in a case where the debtor borrowed for safeguarding his property or saving the property from being sold in Court-auction sale. We are, therefore, of the view that the debtor in this case cannot come within the exemption provided in section 12 (1). However, in this case, there is so far no decision by the Special Tahsildar holding that the 3rd respondent is entitled to the benefits of the Act. The application before the Tashildar is still pending. Therefore, the 3rd respondent has to prove his entitlement for the benefits of the Act before the Tahsildar where the application under section 6 is said to be pending.

4. The writ petition is dismissed. The dismissal of the writ petition, however, will

not prejudice the petitioner in establishing his case that the debtor, the 3rd respondent, is not entitled to the benefits of the Act before the Tahsildar concerned. There will be no order as to costs.

R. S. —— *Writ petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Rajeswari ... *Petitioner**

v.

Vasumai Lalchand ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (2)—Petition for eviction on ground of wilful default in payment of rent—Eviction ordered by Controller—Appellate Authority reversing order on assumption that default must have been due to difficulties in tenant's family—Revision against order—Subsequent payment no sufficient excuse nor can relieve tenant from the charge of wilful default.

The revision petitioner (landlady) filed an application for eviction of the tenant on the ground of wilful default in payment of rent for the period commencing from 1st February, 1976 to 30th June, 1976. The application for eviction itself was filed on 27th July, 1976. In August, 1976 the respondent sent a money order. The money order having been refused a demand draft was sent which was received by the landlady. The plea of the tenant that under the circumstances he had not committed wilful default in the payment of rent inasmuch as payment had been accepted by the landlady was rejected by the Rent Controller and eviction was ordered. On appeal, the Appellate Authority allowed the appeal and set aside the order of eviction, on the ground that defalut must have been due to difficulties in the family of the tenant. On revision by the landlady,

Held : This is a clear case where the tenant had committed wilful default in the payment of the rent. In the absence of any plea by the tenant himself that the delay in payment of rent was occasioned because of the difficulties in the family, such a theory should not have been thought of by the Appellate Authority. [*Para.* 3.]

G. Natarajan and *K. B. Kannan*, for Petitioner.

G. Nandalal, Prakash Goklaney, G. Nagasami and *M. Gomathi*, for Respondents.

The Court made the following

ORDER.—The landlady is the revision petitioner, who filed an application for eviction of the respondent from the petition-mentioned premises on the ground that he had committed wilful default in the payment of rent for the period commencing from 1st February, 1976 to 30th June, 1976. The application for eviction itself came to be filed on 27th July, 1976. In August, 1976 the respondent sent a money order. That money order having been refused, a demand draft was sent on 25th August, 1976, which was received by the landlady on 30th August, 1976. Under these circumstances, the plea of the tenant that he had not committed wilful default in the payment of rent since the payment had later been accepted, was rejected by the Rent Controller and he held that whatever might have been the subsequent conduct of the tenant, in so far as absolutely no explanation was offered for the non-payment of rent for the period covered by the application for eviction, it was supine or callous indifference on the part of the tenant. Therefore, the Rent Controller ordered eviction under section 10 (2) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. On appeal by the tenant, the Appellate Authority was of the view that no doubt, there was non-payment of rent for the period from 1st February, 1976 to 30th June, 1976. However, this according to him must have been due to some difficulties in the family of the tenant. Be it noted at this stage that this was

* C.R.P. No. 2521 of 1981.

30th September, 1982.

not pleaded by the tenant, much less proved. In this view, the Appellate Authority set aside the order of eviction passed by the Rent Controller. Hence the present civil revision petition.

2. What is contended Mr. by G. Natarajan, learned counsel for the petitioner, which in my view is justified, is that the Appellate Authority has made out a special pleading in favour of the tenant holding that the non-payment of the rent was due to certain difficulties in the family of the tenant. This was not even pleaded by the tenant in his counter, nor was it proved by any evidence. Therefore, in the absence of any explanation for the non-payment of the rent, the fact that there was a subsequent payment wonld not relieve the tenant of the charge of wilful default in the payment of the rent. In opppsition to this, Mr. G. Nandalal, learned counsel for the respondent would urge that the subsequent payment of rents would clearly go to show that the tenant had no intention of withholding the rent, but on the contrary, he was anxious to avoid his liability by payment and that, therefore, this may be a case of default, but not wilful default.

3. On a careful consideration of the above aspects, I am of the view that this is a clear case where the tenant had committed wilful default in the payment of the rent. I have perused the counter statement filed by the tenant in opposition to the application for eviction. Nowhere does it adduce any reason for the non-payment of rent between 1st February, 1976 and 30th June, 1976. After the application for eviction came to be filed on 27th July, 1976, any tender of rent would not relieve him of the earlier charge of wilful default. Therefore, rightly the complaint is made before me that the Appellate Authority has made out a special pleading in favour of the tenant. In the absence of any plea by the tenant that the delay in the payment of rent for the period between 1st February, 1976 and 30th June, 1979 was occasioned because of the difficulties in the family, such a theory should not have been thought of by the Appellate Authority. Accordingly, I set aside the order of the Appellate Authority and restore the order of eviction as passed by the Rent Controller. The civil revision petition is allowed accordingly. No costs.

4. As agreed to by the landlady the tenant is given six months time from today, to hand over vacant delivery of possession. But this is subject to the following two conditions, namely: (1) the rent for the six months shall be paid by the tenant on or before the 15th of every succeeding calendar month and if there are two consecutive defaults, the concession granted herein will go; and (2) at the end of six months period, the tenant will deliver vacant possession of the premises without raising any objections. In other words, without requiring the landlady to go by way of execution to recover possession, the tenant will deliver vacant possession of the premises.

R S. —— *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*G. Maheswaran, J.*

E. Rangaraja ... *Petitioner**

v.

The Revenue Divisional Officer, Tiruchirapalli and others ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), section 5—Application by debtor for relief under the Act in respect of gold articles alleged to have been pledged—Existence of the debt as well as pledge disputed—Jurisdiction of Tahsildar to go into the question.

Held: Where a debtor alleges the existence of a pledge and claims relief under the provisions of the Act XIII of 1980 and the other party contends that there was no pledge at all, and no amount was due to him under the pledge, such controversy between the parties cannot be gone into by the Tahsildar. It is only in cases where the pledge is admitted, the Tahsildar can go into the question as to whether the debt for which the pledge has

*W.P. No. 2222 of 1981. *21st January, 1982.*

been made, had been discharged or not. As, in this case, the very existence of the pledge is in dispute, the matter has to be agitated by the so-called debtor before a civil Court in a regular suit. [*Para.* 2.]

Petition under Article 226 of the Constitution of India for issue of writ of *certiorari* to call for records of first respondent in D. Dis. 14410 of 1980, dated 26th February, 1981 and quash the same.

K. Sarvabhauman, for Petitioner.

N. R. Chandran, Additional Government Pleader II and *T. R. Rajagopalan*, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The third respondent herein filed an application before the second respondent for relief under section 5 (1) (*a*) of the Tamil Nadu Act XIII of 1980, in respect of certain gold articles said to have been pledged by him with the petitioner. The petitioner resisted the said application on the ground that there was no pledge at all and that the receipt produced by the third respondent was not true and genuine. Having regard to the controversy, the second respondent held that since the existence of the debt as well as the pledge is disputed by the petitioner, who is stated to be the creditor, the matter has to be agitated before the civil Court. However, when the matter was taken to the Appellate Authority, the first respondent herein, he held that the authorities constituted under the Act can go into the question, as to whether there was in fact a pledge or not and that on the basis of the evidence adduced by the third respondent, that there was a pledge, the third respondent is entitled to a direction for the return of the alleged pledged articles under section 5 (2) (*a*) of the Act. Aggrieved against the order of the Appellate Authority, the petitioner has filed the present writ petition.

2. According to the petitioner, the debtor himself has filed a suit for the return of the alleged pledged jewels on the ground that he is entitled to the benefits of Act XIII of 1980 that in that suit the existence or otherwise of the pledge can be gone into, that the Tahsildar, the second respondent herein, who is functioning under the Act, cannot go into the disputed question as to whether in fact there was a pledge or not, and that only in cases where the pledge is admitted, the second respondent can go into the question of its discharge. We are inclined to agree with the contention of the learned counsel for the petitioner. Where a debtor alleges the existence of a pledge and claims relief under the provisions of the Act and the other party contends that there is no pledge at all, and no amount is due to him under the pledge, such controversy between the parties cannot be gone into by the Tahsildar. It is only in cases where the pledge is admitted, the Tahsildar can go into the question as to whether the debt for which the pledge has been made, has been discharged or not. As in this case, the existence of the pledge itself is in dispute, the matter has to be agitated by the so-called debtor before the civil Court in a regular suit. As a matter of fact, in this case, the third respondent has filed O. P. No. 97 of 1980, Sub-Court, Tiruchirapalli, for permission to sue the petitioner *in forma pauperis* for the return of the pledged jewels and in that petition he has been directed to pay the necessary Court-fee. The third respondent can, therefore, agitate the question relating to the existence of the pledge in those proceedings by paying the necessary Court-fee. Even if O. P. No. 97 of 1980 has been dismissed for non-payment of Court-fee, the third respondent can approach the Court with an offer to pay the Court-fee and have that suit restored for getting a decision from a civil Court on the question of the existence of the pledge.

3. The writ petition is therefore, allowed and the order of the Appellate Authority is set aside. There will be no order as to costs.

R. S. —— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*G. Ramanujam and V. Sethuraman, JJ.*

M/s. Dalmia Cement (Bh) Ltd., Proprietor of Govan Travels, Madras-6 ... *Appellant**

v

Mrs Kamala Pillai and another ... *Respondents.*

Civil Procedure Code (V of 1908), Order 38, rule 5 and Order 21, rules 58 and 63 (prior to amendment by Act CIV of 1976)—Money suit—Petition for attachment before judgment ordered—Property attached—Claim petition to raise attachment filed by wife of judgment-debtor—Suit decreed—Claim petition dismissed for default—Attachment made absolute—Property brought to sale in execution of decree—Sale notice issued to judgment-debtor—Fresh claim petition filed by his wife claiming the property as her property, whether maintainable.

Held: The respondent herein had not filed a suit to challenge the dismissal of the eviction claim petition at the stage of attachment before judgment. The said order of dismissal had become final and conclusive as per Order 21, rule 63 which was in force at the time of attachment before jugdment. No doubt Order 21, rule 63 has been deleted by the Central Act CIV of 1976, but even before such deletion, the right to question the order in the claim petition by filing a suit had been lost The suit report cannot be said to have been revived after the deletion of the said provision in Order 21, rule 63 by the Central Act CIV of 1976. The decision of the lower Court cannot be sustained.

[*Para.* 8.]

Cases referred to:—

Prasada Naidu v. *Virayya*, (1918) I. L. R 41 Mad. 849 : 8 L. W. 197 : 35 M. L. J. 231 ; *Cannanore Bank, Madhavi*, (1941) 2 M. L. J. 956 : I. L. R. (1942) Mad. 336: 54 L. W 671 : A. I. R. 1942 Mad. 41 ; *Bhailal Pahti* v. *Prabri Sahib*, A. I. R. 1953 Pat. 223 *Kissorinobji Roy* v. *Harsukh Das*, (1890) I. L. R. 17 Cal. 437

*A. A. O. No. 66 of 1978, 1s *September*, 1981.

Appeal against the order of the City Civil Court, Madras, dated 27th July, 1977 in E. A. No. 1568 of 1976 in E. P. No. 945 of 1973 in O. S. No. 6614 of 1973.

L. K. Sankaran, for Appellant.

The Order of the Court was made by

Ramanujam, J.—An interesting question of law has arisen for consideration in this appeal. The appellant herein filed a suit O. S. No 6614 of 1973, on the file of the City Civil Court, Madras, for recovery of a sum of Rs. 36,887.97, from the second respondent, who is the defendant in the suit. Pending the suit, the plaintiff applied for attachment of the house property said to belong to the second respondent before judgment in I. A. No. 23042 of 1973. The said house property was in fact attached on 10th December, 1973. The first respondent herein, who is the wife of the second respondent-defendant filed a claim petition in I. A. No. 465 of 1974, claiming that the property attached did not belong to the second respondent but it belonged exclusively to her and therefore, the attachment should be vacated. During the pendency of the said claim petition, the suit itself came to be decreed on 5th February, 1974. The claim petition I. A. No. 465 of 1974, filed by the first respondent was dismissed for default on 3rd October, 1974, and the attachment effected on 10th December, 1973 was made absolute. Subsequently, the appellant filed an execution petition E. P. No. 943 of 1973 on 7th December, 1974 and brought the attached property to sale and a sale notice was actually issued to the second respondent on 9th December, 1975. After the receipt of the sale notice by the second respondent, the first respondent herein filed another claim petition E. A. No. 1568 of 1974 at the execution stage on 3rd February, 1976 claiming that the property sought to be sold is her exclusive property and does (*sic*) not belong to the second respondent. The said claim petition was resisted by the appellant decree-holder on the ground that the earlier claim petition filed by the first respondent in

I. A. No. 465 of 1974 having been dismissed for default, she is not entitled to file a second claim petition and that the only remedy open to her is to file a suit under Order 21, rule 63, Civil Procedure Code, against the order dismissing her first claim petition for default. This objection has been rejected by the Court below on the ground that the earlier claim petition was dismissed for default and not on merits and that the present claim petition, being the first petition in execution, is maintainable. The Court below also went into the merits of the claim put forward by the first respondent herein and held that Exhibits P-1 to P-3 establish that the property attached and sought to be sold by the decree-holder belongs to the claimant and not to the judgment-debtor, that the latter had no right, title or interest over the same and that, therefore, the decree-holder cannot proceed against this property. In this view, the claim petition had been allowed by the Court below. The validity of the said order has been challenged in this appeal by the appellant decree-holder.

2. The learned counsel for the appellant refers to the Full Bench decisions of this Court, *viz.*, *Prasada Naidu* v. *Virayya*[1], and *Cannanore Bank* v. *Madhavi*[2], and submits that as per the said decisions, the dismissal of the entire claim petition for default will have to be taken as an order passed, against the claimant, that the order dismissing the claim petition for default though made in the proceedings for attachment before judgment, the provisions of Order 21, rule 63, Civil Procedure Code, will come into play, that as per the said provision, the claimant whose claim petition has been dismissed earlier, should file a suit within one year from the date of the order and that in the absence of instituting any such suit, the order will be taken to have become final and conclusive as between the parties. The learned counsel also refers to the decision in *Bhailal Pahti* v. *Prabri Sahib*[3], wherein the decision of this Court in *Cannanore Bank* v. *Madhavi*[1], is followed.

1. (1918) I. L. R. 41 Mad. 849 : 35 M. L. J. 231 : 8 L. W. 197.
2. (1941) 54 L W. 671 : (1941) 2 M. L. J. 956 : I. L. R. (1942) Mad. 336 : A. I. R. 1942 Mad. 41 (F. B.).
3. A. I. R. 1953 Pat. 223.

3. The lower Court has referred to the decisions in *Bhailal Pahti* v. *Prabiri Sahib*[2] and *Cannanore Bank* v. *Madhavi*[1], but stated that the said decisions have no application to the facts of the present case.

4. Before proceeding to consider the decisions referred to by the learned counsel for the appellant we would refer to the relevant provisions of the Code of Civil Procedure, as were in force at the time when the claim against the order of attachment before judgment was dismissed for default. Order 38, rule 5, Civil Procedure Code, enables the Court to attach the defendant's specified property or such portion thereof as it appears sufficient to satisfy any decree which may be passed in the suit. Rule 7 of Order 38, states that the attachment shall be made in the manner provided for the attachment in execution of a decree. Rule 8 states as follows:—

> "Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money."

These provisions in rules 7 and 8 make it clear that the manner of attachment before judgment and the manner of adjudication of claims to property so attached shall be the same as an attachment in execution of a decree and adjudication of claims to property attached in execution of a decree. The provisions dealing with the adjudication of claims to property attached in execution of a decree are contained in Order 21, rules 56 and 63, Civil Procedure Code. While rule 56 sets down the procedure for adjudication of claims in respect of property attached in execution of a decree, rule 63 provides for the filing of a suit to establish right to attached property. This provision is as follows:

1. (1941) 54 L. W. 671 : (1941) 2 M. L. J. 956 : I. L. R. (1942) Mad. 336 : A. I. R. 1942 Mad. 41 (F. B.).
2. A. I. R. 1953 Pat. 233.

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive".

Since Order 38, rule 98, Civil Procedure Code, directs that adjudication of claims to property attached before judgment should be done in the same manner as an adjudication of claims against attachment of the property in execution of a decree, Order 21, rules 58 and 63, Civil Procedure Code, will automatically apply to the claims made against an order of attachment before judgment.

5. In this case, as will be clear from the facts set out already, the attachment before judgment of the house property was effected on 10th December, 1973, and the order dismissing the claim petition was passed on 3rd October, 1974. The one year period referred to under Order 21, rule 63, Civil Procedure Code, had, therefore, expired on 3rd October, 1975, long before the filing of the second claim petition on 3rd February, 1976. The Court below has taken the view that since the attachment was made before judgment, the dismissal of the earlier claim petition for default will not be a bar to the first respondent herein filing a fresh claim petition in the execution stage after the decree has been passed It has also taken the view that the order dismissing the earlier claim petition on 10th December, 1973, being an order of dismissal for default cannot be said to be an order passed on merits so as to constitute *res judicata*. The question is whether the view taken by the Court below is legally tenable.

6. Dealing with the scope of Order 21, rule 63, Civil Procedure Code, as it stood before the amendment of the Civil Procedure Code by Central Act CIV of 1975, a Full Bench of this Court in *Prasada Naidu* v. *Virayya*[1], held that Order 38, rule 5, will attract the provisions of Order 21, rule 63, in respect of claims preferred to property attached before judgment and that the general policy of the law is that questions of title raised by claims against attachment before judgment or after judgment should be promptly disposed of and, that as has been pointed out by the Privy Council in *Kissorinobji Roy* v. *Harsukh Das*[1], Order 21, rule 63, Civil Procedure Code, was applied without question to a case of attachment before judgment as well.

7. In *Cannanore Bank* v. *Madhavi*[2], another Full Bench of this Court had ruled that Order 21, rule 63, applies to all orders which are against claims preferred under rule 58 of Order 21, Civil Procedure Code, that the order passed under rule 58 need not necessarily be on merits, and that the test is to see whether the order is against the claimant or the decree-holder and that it does not mean that the order must involve an adjudication on the merits after investigation. In that case a claim petition was filed but that was allowed to be dismissed as not pressed. The question arose whether that order will attract the provisions of Order 21, rule 63, Civil Procedure Code. The Full Bench was of the view that such an order will be an adverse order within the meaning of the rule and that an order of dismissal for default will also fall within the mischief of that rule. This decision is clearly applicable to the facts of the present case. Here the earlier claim petition was dismissed for default and that will be an order adverse to the claimant and therefore, rule 63 of Order 21, will stand attracted. The earlier Full Bench decision reported in *Prasada Naidu* v. *Virayya*[3], makes it clear that Order 21, rule 63 will also apply to the claims preferred against the order of attachment before or after judgment. Thus, the reasoning of the Court below that the dismissal of the earlier claim petition for default having been made at the stage of attachment before judgment, will not come within the mischief of Order 21, rule 63, Civil Procedure Code, is not legally tenable. Though the decision is *Cannanore Bank* v. *Madhavi*[2], was cited before the Court below, that decision has not been followed as it was of the view

1. (1918) I. L. R. 41 Mad. 849 : 35 M. L. J. 231 : 8 L. W. 197 (F.B.).

1. (1890) I. L. R. 17 Cal. 437.
2. (1941) 54 L. W. 671 : (1941) 2 M. L. J. 956 : I. L. R. (1942) Mad 336 : A. I. R. 1942 Mad. 41 (F.B.).
3. (1918) I. L. R. 41 Mad. 849: 35 M. L. J. 231: 8 L. W. 197 (F. B.).

that the facts of the present case are different. We are of the view that the facts in this case clearly attract the principle laid down by the two Full Bench decisions above referred to.

8. Since admittedly the first respondent herein has not filed a suit to challenge the dismissal of the earlier claim petition at the stage of attachment before judgment, the said order of dismissal has become final and conclusive as per Order 21, rule 63, which was in force at the time of attachment effected before judgment. No doubt it is true that Order 21, rule 63, has been deleted by the Central Act CIV of 1976, but even before the deletion, the right to question the order passed in the claim petition in I. A. No. 465 of 1974 by filing a suit has been lost even on 3rd January, 1975 and the said right cannot be said to have been revived after the deletion of the said provision in rule 63 of Order 21, Civil Procedure Code, by Central Act CIV of 1976. We cannot therefore, sustain the decision of the lower Court.

9. Hence, we allow the appeal and set aside the order of the lower Court. The claim petition, E. A. No. 1568 of 1976 for raising the attachment over the property will stand dismissed. There will be no order as to costs. The execution proceedings will be proceeded with further on the basis that the attachment of the property continued to subsist.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O. C. J.*

Raphael and others ... *Petitioners**

v.

S. Chellappan, Executive Officer ... *Respondent.*

Tamil Nadu Panchayats Act (XXXV of 1958), section 170 and Civil Procedure Code (V of 1908), Order 1, rule 10—Petition to implead Panchayat as party in suit—Objection of notice under section 170 not being given — Objection not sustainable—Notice applicable only where compensation is claimed against Panchayat.

Where in a petition to implead a Panchayat as party to a suit, objection was raised on ground want of notice under section 170 of the Tamil Nadu Panchayat Act, 1958,

Held: The notice contemplated under section 170 is applicable only to cases wherein compensation is claimed against the Panchayat. [*Para.* 2.]

Case referred to :—

Panchyat Union Council v. *C. Thirupathy*, (1970) 2 M. L. J. 572 : 83 L. W. 536 : A. I. R. 1971 Mad. 26 (F. B.).

Petition under section 115 of Act V of 1908 to revise the order of the Prl. District Munsif, Padmanabhapuram, dated 16th July, 1981 in I. A. No. 660 of 1981 in O. S. No. 267 of 1980.

K. Jayaraman for *V. P. Ananthakrishnan Nair*, for Petitioners.

Selvaraj, for Respondent.

The Court made the following

ORDER.—The plaintiff in O. S. No. 267 of 1980 on the file of the District Munsif, Padmanabhapuram, filed I. A. No. 660 of 1981 for impleading the Karungal Town Panchayat as the second defendant in the suit. This was objected to by the defendant in the suit who

*C. R. P. No. 2684 of 1981. *24th December*, 1981.

is the Executive Officer of the Karungal Town Panchayat on the ground that notice under section 170 of the Tamil Nadu Panchayats Act (XXXV of 1958) had not been given before the institution of the suit and as such the second defendant cannot be impleaded. The District Munsif holding that a notice under section 170 of the said Act ought to have been given before instituting the suit dismissed the application. It is as against this order, the present revision petition has been filed by the plaintiff.

2. Section 170 of the Tamil Nadu Panchayats Act deals with notice of action against Panchayat, etc. This, according to the learned counsel appearing for the petitioner can be invoked only in cases where compensation is claimed against the Panchayat, Mr. Selvaraj, the learned counsel appearing for the respondent, correctly brougtht to my notice the decision reported in *Panchayat Union Council* v. *C. Thirupathy*[1], wherein it has been held that section 170 will be applicable only in cases where compensation is claimed against the Panchayat. It is also clear from section 173 which reads at follows:

"Liability of the President executive authority and members for loss, waste or misapplication of property:—

(1) The President, executive authority and every member of a Panchayat and the chairman, commissioner and every member of a Panchayat Union Council shall be liable for the loss, waste or misapplication of any money or other propery owned by or vested in the Panchayat or Panchayat Union Council if such loss, waste or misapplication is a direct consequence of his neglect or misconduct; and a suit for compensation may be instituted against him in any Court of competent jurisdiction by the Panchayat or Panchayat Union Council with the previous sanction of the Inspector.

(2) Every such suit shall be commenced within three years after the date on which the cause of action arose".

That the notice contemplated under section 170 is applicable to cases wherein compensation is claimed against the Panchayat; there cannot be an, dispute with regard to this proposition of law, any hence it is clear that the order passed by the Court below is erroneous. In these circumstances, the civil revision petition is allowed, with the result, the petition to implead the second respondent is ordered as prayed for. There will be no order as to costs. The trial Court is directed to dispose of the suit as expeditiously as possible, at any rate, before the end of March, 1982.

R. S. —— *Petition allowed.*

1. (1970) 2 M. L. J. 572: 83 L. W. 536: A.I.R 1971 Mad. 26 (F. B.)

IN THE HIGH COURT OF JUDICTURE AT MADRAS.

Present:—*S. Mohan, J.*

Muthulakshmi ... *Appellant*

v.

Arumuga Padayachi and another ... *Respondents.*

Tamil Nadu Agriculturists' Debt Relief Act (IV of 1938) as amended by Tamil Nadu Act (VIII of 1973), sections 3 (iii), 7 *and 9-A—Definition of agriculturist —Amendment—Extension of benefits under Act of 1973 to certain categories of persons—Qualification as to being an "agriculturist at the time of incurring the debt" not affected by the amending act—Scope.*

On a reading of the provisions of the Tamil Nadu Act VIII of 1973, it is clear that in order to claim the benefit under the Debt Relief Acts one should prove that on the date of the incurring of the debt one was an agriculturist. The fact that one becomes subsequently an agriculturist cannot take within it the definition of agriculturist because even under the amended section 3 (*iii*) of Act VIII of 1973 the debt that is spoken is one due from an agriculturist. A careful reading of that section makes the matter simple. The debt must be by an agricutulrist. At what point of time the debtor has to be agriculturist is easily

*S. A. No. 959 of 1978. *30th September,* 1981.

discernible. It must be nothing but on the date of incurring the debt. Therefore this basic qualification cannot be held to be dispensed with. [*Para.* 5.]

All that the amending Act VIII of 1973 has provided for is nothing more than to extend the benefits to a few categories of persons. That is not to say that the basic dualification *viz.*, on the date of incurring the debt one has to be an agriculturist has been dispensed with. Section 7 contains the *non obstante* clause but, that has nothing to do whatever with the definition of debt. It merely means, in spite of the decree of Court there can be a scaling down. [*Para.* 5.]

Appeal against the decree of the Sub-Court, Cuddalore in A. S. No 139 of 1976 preferred against O S. No. 1063 of 1974, District Munsif Court, Cuddalore.

R. S Venkatachari, for Appellant.

Umapathi for *Raj and Raj*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant in this second appeal having partly succeeded in her relief for redemption has come forward with the second appeal to this Court only in so far as she has been denied the right of scaling down. The facts which led to the second appeal are as follows: The first defendant executed the bogiam in respect of the suit property in favour of the second defendant in and by a registered document, dated 1st July, 1961 (Exhibit A-2) for a sum of Rs. 2,500. The second defendant was a minor then and therefore, she was represented by her husband as guardian. The second defendant was in possession of the property since the date of bogiam. Under a registered sale deed, Exhibit A-1, dated 17th March, 1966, the plaintiff came to purchase the suit property. The plaintiff and the first defendant are agriculturists and therefore, the bogiam amount has to be scaled down in accordance with the provisions of Tamil Nadu Act IV of 1938 as amended by Act VIII of 1973. Inasmuch as the first defendant has been in possession of the suit property for 13 years the plaintiff is liable to pay as per the provisions of the Act only Rs. 1,416.66. The said amount is deposited into Court and therefore, the plaintiff is entitled to redemption.

2. The first defendant remained *ex parte*. In the written statement filed by the second defendant it was contended that she has paid a sum of Rs. 345 to the plaintiff's husband and got the service connection transferred in her name. In addition to this second defendant had put up 13 electric points in the house and she has spent Rs. 400. The plaintiff is bound to pay these amounts before she is granted a decree for redemption. The second defendant informed the plaintiff about the damages occurring to the property, but the plaintiff did not care to repair the same. Therefore, any claim on that score is untenable. The second defendant has not admitted that she is entitled only to Rs, 1,416.66 as stated in the plaint. The learned District Munsif found that the plaintiff was entitled to redemption on payment of the principal amount due on the mortgage. In so far as the relief of scaling down was concerned he was of the view that the plaintiff did not prove that she was an agriculturist on the date of the incurring of the debt and hence, that relief was denied. There upon, the matter was taken on appeal in A. S. No. 139 of 1976 to the Court of the learned Subordinate Judge, Cuddalore. The learned appellate Judge also concurred with the findings of the trial Judge and dismissed the appeal. Thus arises the present second appeal.

3. It is urged by Mr. R. S. Venkatachari, learned counsel for the plaintiff-appellant that the Courts below are wrong in so far as they failed to note that the claim of the plaintiff was under Act IV of 1938, as amended by Act VIII of 1973. Therefore, the Courts below ought to have held with regard to the amended provisions under Act VIII of 1973, particularly the definition of debt, the definition of agriculturist, the *non-obstante* clause in section 7 and granted the relief under section 9-A. As a matter of fact the claim for relief under these Acts has not been disputed by the other side.

4. Mr. Umapathi, learned counsel for the defendants-respondents, states that the basic qualification for obtaining relief under Tamil Nadu Act IV of 1938, or Act VIII of 1973, would be that on the

date of the incurring of the debt the claimant must be an agriculturist and in the instant case the debt was in 1961. Exhibit A-4 is dated after the suit and therefore, that has been rightly rejected. The only other document on which reliance is placed and as a matter of fact it is admitted by the lower appellate Court is Exhibit A-6. That document by itself does not prove that on the date of the incurring of the debt the plaintiff happens to be an agriculturist, because it was a partition decree of the year 1968. There is nothing to prove that even in 1961 the plaintiff or her predecessor owned this property. Having regard to all these documents it cannot be said the basic proof or the qualification that one must show that on the date of the incurring of the debt the claimant must be an agriculturist has been established. Hence, the judgments and decrees of the Courts below can easily be sustained.

5. I have given my careful consideration to the above arguments. I have also perused the judgments of the Courts below. One thing appears to be certain by a reading of the provisions of Act IV of 1938 as amended by Act VIII of 1973, *viz*,, that in order to claim the benefit under these Acts one should prove that on the date of the incurring of the debt one must be an agriculturist. The fact that one becomes subsequently an agriculturist cannot take within it the definition of agriculturist, because even under amended section 3 (*iii*) of Act VIII of 1973 the debt that is spoken to is due from an agriculturist. Therefore, by a careful reading of that section the matter appears to be simple. The debt must be by an agriculturist. At what point of time she has to be an agriculturist is easily discernible. It must be nothing but the date of the incurring of the debt. Therefore, this basis cannot and as of fact is not dispensed with. What about the definition of agriculturist? In my considered view all that the amended Act VIII of 1973 has provided for is nothing more than to extend the benefits to a few other categories of persons That is not to say that the basic qualification, *viz.*, on the date of incurring of the debt one has to be an agriculturist, has been dispensed with Now, we go to section 7. Section 7 contains the ***non-obstante*** clause, but that has nothing to do whatever with the definition of debt. It merely means, in spite of the decree of the Court there can be a scaling down. For instance, supposing a person has obtained a decree against an agriculturist. Even on the date of the execution of the decree it is open to that agriculturist to seek the benefit of scaling down. Therefore, section 7 is not helpful. Equally I can say about section 9-A. I am also of the view that in so far as there is total lack of proof that the plaintiff is an agriculturist I see no scope for applying any one of these provisions. The reason why I say there is total lack of proof that the plaintiff-appellant is an agriculturist is because there are only two documents filed on his side. One is Exhibit A-4. That is ***post litem mortem***. The suit is filed in 1974. The document is dated 16th September, 1974. Rightly therefore, that has been rejected by both the Courts below. Then what remains is only Exhibit A-6. No doubt, that is admitted as an additional evidence by the lower appellate Court. That has not advanced the case of the appellant any further for the very simple reason that it is a compromise decree in which the plaintiff-appellant was allotted certain properties. Even that does not show that on the date of incurring of the debt the plaintiff-appellant was an agriculturist. Thus the conclusion is inescapable as correctly found by the Courts below, the plaintiff is not an agriculturist Hence, I have no other alternative but to dismiss the second appeal. This second appeal is accordingly dismissed. However, since the argument before us is on a question of law relating to the interpretation of the provisions of Act IV of 1938, as amended by Act VIII of 1973, I make no order as to costs in this second appeal.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Ratnavel Pandian, J.*

G Seshagiri and others ... *Petitioners**

v.

D. Perumal ... *Respondent*

Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for declaration and recovery of possession on the basis of a will—Defendant denying execution of the will by the plaintiff's father—Plea of purchase of suit property in the name of the latter benami for the defendant—Application for amendment of the plaint to insert, alternative prayer for declaration of plaintiff's entitlement to half share as heir and to direct division of the property in case will was found against—Amendment made six years after filing of plaint and at the close of evidence—Amendment allowed.

Held:—In the present case, the suit for declaration of plaintiff's title to the suit property and for recovery of possession etc., on the basis of a will alleged to be executed by his father was filed in 1974 and the present application for amendment of the plaint has been taken out after a period of six years, that too when the proceedings have come to a closing stage. It is an accepted principle of law that an application for amendment of the pleaddings can be allowed before or after the trial or before the final decree in the case or even at the appllate or revisional stage. The Court, as a rule, is disinclined to grant leave to amend the plaint only in cases where such an amendment introduces a totally new case or necessitates a fresh trial or where the amendment would tend to endless complications or where the plaintiff has been deliberately negligent and has taken a new stand at a late stage deliberately. The addition of the alternative relief, in the present case, namely, to declare his entitlement to a half share and on the basis of inheritance to his father does not in any way vary the cause of action or the subject-matter of the suit. The plaintiff no doubt could have taken steps even at the earliest point of time to ask for this alternative relief, but that cannot stand in the way of the plaintiff now seeking amendment. If such an amendment is not now permitted and if both the plaintiff's claim based on the testament and the defendant's case that the properties were purchased benami in the name of the plaintiff's father for the benefit of the first defendant are rejected, then the plaintiff will necessarily be led to file a fresh suit for partition based on his right of inheritance. If, on the other hand, the defendant's contention is completely accepted, then the plaintiff will not be entitled to any relief in respect of the suit properties even if the amendment sought for by him is allowed. Therefore the defendant is not in any way prejudiced by the addition of this alternative relief. [*Para.* 18.]

Cases referred to:—

Kumaraswami Gounder v. *D. R. Nanjappa Gounder*, I. L R. (1978) 3 Mad. 1 : 91 L. W. 357 : A. I. R. 1978 Mad. 285; *C. T. Muthiah* v. *Srinivasan*, (1978) T. L. N. J. 268; *Jagannath* v. *Labanya Dei*, A. I. R. 1981 Ori. 12; *Mohan Singh* v *Pashupatinath*, (1969) 2 S. C J. 866 : (1970) 1 S. C. R. 428 : A. I. R. 1970 S. C. 42; *Bhawani Dass* v. *Kaushalya Rani*, A. I. R. 1981 P. &. H. 196; *Achhara Singh* v. *Om Prakash*, A. I. R. 1981 P. & H. 179.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Sholinghur, dated 9th September, 1981 and made in I. A. No. 2551 of 1980 in O. S. No. 759 of 1974.

M. V. Chandran, for Petitioners.

T. R. Rajagopalan and *T R. Rajaraman*, for Respondent.

The Court made the following

ORDER.—This is a petition to revise the order of the learned District Munsif, Sholinghur, dated 9th September, 1981, made in I. A. No. 2551 of 1980 in O. S. No. 759 of 1974 on his file, allowing the amendment of the plaint as prayed for on condition of the respondent-plaintiff paying a sum of Rs. 100 as costs to the revision petitioners defendants and of his paying the additional Court-fee, if any.

*C. R. P. No. 3051 of 1981. *29th October*, 1981

2. The above suit was filed by the respondent-plaintiff for declaration of his title to the plaint schedule property and for recovery of possession of the same on the basis of a will dated 7th December, 1959 alleged to have been executed in his favour by his father. The petitioners-defendants filed a written statement denying the execution of the will by the palintiff's father thus denying the plain tiff's title to the suit property.

3. The plaintiff took out the above application for amendment of the plaint, by adding an alternative prayer *viz.*, that in case the Court holds that the will, on the basis of which he asked for the relief of declaration, is not proved, the Court may be pleased to declare him to be entitled to a half share in the plaint schedule property and to direct division and allotment of the said half share. This amendment, according to the plaintiff, is neessary in order to avoid multiplicity of litigation and in the interest of justice.

4. The above amendment sought for was objected to by the revision-petitioners-defendants, contending that the application for amendment filed after the evidence in the suit had been recorded was highly belated, that there are some properties left behind by the plaintiff's father which are not included in the suit and that the allowance of the application would be tantamount to changing the character and nature of the suit and also the cause of action for the suit.

5. The learned District Munsif, observing that the foundation of the suit is not changed by the proposed amendment, allowed the application. Hence this revision.

6. Mr. M. V. Chandran, learned counsel, appearing for the revision-petitioners, would contend that the lower Court has committed an illegality in allowing the application, by which order the character and nature of the suit and the cause of action have been completely varied as the amendment has substituted a new and distinct cause of action in the place of the original one and also has changed the nature of the suit. He would further state that the Court below ought not to have allowed this belated application filed after the evidence was closed and that the respondent-plaintiff, after having taken a specific stand in the original plaint laying his claim under the will alleged to have been executed by his father in his favour, is now deliberately attempting to substitute a new case. In support of his contention, he would rely on a number of decisions to which I shall refer at the appropriate stage.

7. Before adverting to the contentions of the learned counsel, I feel that it would be better to notice certain admitted facts of the case. The plaintiff is the son of one Doraiswami Mudaliar. The second defendant is the daughter of the abovesaid Doraiswami Mudaliar. The first and third defendants are the husband and son respectively of the second defendant. The plaintiff would aver that the various items of the plaint schedule properties were purchased by his father Dorasiwami Mudaliar under various sale deeds and that he executed a will in 1959 bequeathing all plaint schedule properties to him absolutely, and that his father died at Madras on 23rd January, 1960. The execution of the will is totally denied by the defendants who would allege that the sale deeds were taken in the name of Doraiswami Mudaliar benami for the benefit of the first defendant so as to avoid any possible claim from the first defendant's brothers and therefore the plaintiff has no title to the plaint schedule properties. Thus, it is seen that the basis of the main relief as well as the alternative relief in the plaint is that the plaint schedule properties are the self acquired properties of Doraiswami Mudaliar, while defence of the defendants is that the properties really belonged to the first defendant by virtue of the benami nature of the sale deeds taken in the name of Doraiswami Mudaliar.

8. Mr. Chandran would draw the attention of this Court to paragraph 11 of the plaint wherein it is stated that "the cause of action for the suit arose in June, 1974 from when onwards the defendants are denying the plaintiff's title to the suit properties and are in unlawful possession of the suit properties at Sholinghur... ....." and contend that the plaintiff, after having come forward with such a specific plea, is not at all justified now in asking for an alternative relief of declaration of title and allotment of a half share in the properties in case his claim for the entire pro-

perties on the basis of the will is not upheld by the Court. According to him, while the main relief asked for is based on the ground that he is entitled to the plaint schedule properties on a testamentary right, the alternative relief now claimed would be on the basis that the plaintiff is a joint owner of the properties along with the second defendant, and further, whilst the cause of action for the original (main) relief is the defendants' denial of his title to the suit properties, the cause of action for the alternative relief would be his joint ownership. Thus, according to the learned counsel, the amendment sought for alters the very fundamental character of the suit, *i.e*, the foundation on which the suit as originally laid was based.

9. First of all, the learned counsel cites the decision of this Court, rendered by a Bench to which I was a party, in *Kumaraswami Gounder and others* v. *D R. Nanjappa Gounder and others*[1], in which the Bench has laid down certain principles to be followed while considering an application under Order 6, rule 17, Civil Procedure Code. Therein it was observed that a pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of amending a new cause or case cannot be substituted and the Courts cannot be asked to adjudicate the alternative case instead of the original case.

10. For the same proposition, reliance was also placed on the decision of this Court rendered by Ismail, J., as he then was, in *C. T. Muthiah* v. *J. Srinivasan and others*[2]. In that case, having regard to the nature of the amendment sought for, it was found that the suit was instituted on the basis of the promissory notes therein containing all the terms of the contract and therefore the question of the plaintiff therein seeking any relief on the basis of the debts did not arise.

11. The third decision cited by the learned counsel on this aspect of the matter in *Jagannath* v. *Labanya Dei*[3], in which a single Judge of the Orissa High Court held that when the facts sought to be introduced by way of amendment at the belated stage of arguments were entirely new and alien to the facts alleged in the original plaint and neither directly or indirectly mentioned in the plaint and the plaintiff has not adduced any evidence on that matter, and the defendants were not called upon to have their say on that aspect the relief of amendment of plaint would not be granted, and that in such a ease, if the prayer for amendment was allowed, the Courts would be required to frame new issues on the new aspect and would have to allow both the parties to lead evidence for and against the facts alleged therein, and that moreover the issues involved being entirely new, considerations of such issues would change the tenor, character and nature of the suit in its entirety.

12. So far as the principles laid down in all the above cases are concerned, there can be no controversy. But, the question is whether, on the facts of the present case, those principles would in any way stand in the way of the Court granting the amendment sought for in this case.

13. Mr. Rajaraman, learned counsel for the respondent-plaintiff, would bring to the notice of this Court the averments made in paragraph 7 of the plaint and the contentions raised in para. 13 of the written statement and contend that so far as the plaint Schedule properties are concerned, there is no change in the plea of the plaintiff that they belonged originally to the plaintiff's father Doraiswami Mudaliar and consequently no change in the main relief claimed in the plaint. But, what the plaintiff now seeks by the amendment sought for, is to add an alternative relief which is a lesser relief relating to the same properties, which the Court could grant, and the grant of this alternative relief will avoid multiplicity of proceedings between the parties in respect of the same item of property. I see much force in this argument of Mr. Rajaraman. Coming to the decision in *Kumaraswami Gounder* v. *D. R. Nanjappa Gounder*[1], it would be pertinent to note that there is no material change so far as the pre-existing facts already contained in the original pleadings are concerned. As the alternative relief is one for partition, on the

1. I. L. R. (1978) 3 Mad. 1: 91 L. W. 357. A. I. R. 1978 Mad. 285.
2. (1978) T. L N. J 268.
3. A. I. R. 1981 Orissa. 12.

1. 91 L. W. 357: I. L. R. (1978) 3 Mad. 1.

basis of joint possession and joint ownership of the properties in question, it cannot be said that this amendment in any way changes the subject-matter of the suit. Since the plaintiff had originally asked for the relief of declaration to the entire properties on the basis of his testamentary right, naturally he had given the cause of action as the denial of his title by virtue of the will by the defendants. That in my view, does not negative the existence of the right of the plaintiff to a share in the properties by virtue of inheritance, if any. Therefore, the alternative relief now claimed by the plaintiff by way of amendment is not in any way based on any inconsistent cause of action. A reading of the written statement shows that the defendants denied the right of the plaintiff not only to the entire properties but also to any share therein, because, according to them, the entire properties were purchased by Doraiswami Mudaliar benami for the benefit of the first defendant. Therefore, it is natural that the plaintiff, by way of abundant caution, has added the alternative relief seeking partition and separate possession of a half share in the properties in case the Court upholds the contention of the defendants. It cannot be said that the plaintiff, under the guise of an amendment, is substituting a new cause of case and requesting the Court to adjudicate the alternative case instead of the original case. Hence, the principles laid in the above decision can have no application to the facts of the present case.

14. The decision in *C. T. Muthiah* v. *J. Srinivasan*[1], related to the execution of a promissory note and the question was whether the suit as sought to be amended was based on the promissory note itself or on some antecedent debt independent of the promissory note. The facts are entirely different in this case and therefore that decision also has no application to this case.

15. The third cited decision *viz.*, *Jagannath* v. *Labanya Dei*[2], lays down that entirely new and alien facts to those alleged in the original plaint should not be allowed to be introduced by way of amendment at a belated stage, so as to prejudice the defendants. No such question arises in this case, and, in my opinion, no prejudice can be said to have been caused to the defendants by the amendment sought for.

16. Then the learned counsel referring to three other decisions, *viz.*, *Mohan Singh* v. *Pashupatinath*[1], *Bhawani Dass* v. *Kaushalya Rani*[2], *Achhara Singh* v. *Om Prakash*[3], contended that the lower Court ought not to have allowed this belated application after the lapse of six years especially when the matter has come to a final stage and when plaintiff had slept over the matter for such a long time.

17. The Supreme Court in *Mohan Singh's case*[1], having regard to the fact that the litigation was more than 22 years old, rejected the plea for amendment on the basis of an alleged custom prevailing in the family of the parties, and held, "we do not think that we would be justified at this date in allowing the parties to raise a new contention and give it a fresh lease of life". In *Bhawanidas's case*[2], an application was taken out for amendment of the plaint by addition of a co-vendee as a new defendant. On the date of the application, the suit had become time-barred. It was under those circumstances the amendment was not allowed. *Achhara Singh's case*[3], relatedto an application for eviction on the ground of default and *bona fide* requirement of the premises for the use and occupation of the landlord's family. The amendment sought for after a decade, when the matter was pending revision in the High Court, introduced a ground that the premises was required for the use of the landlord's married son and it was on those facts and on the ground of laches, the High Court dismissed the application for amendment holding that the landlord was not entitled to the discretionary relief of amendment. Therefore, these decicions are not helpful to the respondent.

1. (1978) T. L. N. J 268.
2. A. I. R. 1981 Orissa 12.

1. (1969) 2 S. C. J. 866 : (1970) 1 S. C. R. 428 : A. I. R. 1970 S. C. 42.
2. A. I. R. 1981 P. & H. 196.
3. A. I. R. 1981 P. & H. 179.

18. No doubt, in the present case, the suit has been filed in the year 1974 and the present application has been taken out after a period of six years, that too when the proceedings have come to a closing stage. It is an accepted principle of law that an application for amendment of the pleadings can be allowed before, at or after the trial or before the final decree in the case or even at the appellate stage or revisional stage. But the Court, as a rule, is disinclined to grant leave to amend the plaint only in cases where such an amendment introduced a totally new case or necessitates a fresh trial or where the amendment would lend to endless complications or where the plaintiff has been deliberately negligent and has taken a new stand at a late stage deliberately. As I am of the view, as pointed out supra, that the addition of the alternative relief does not in any way vary the cause of action or the subject-matter of the suit the contention of the learned counsel for the petitioner cannot be accepted. The plaintiff, no doubt, could have taken steps even at the earliest point of time to ask for this alternative relief; but that cannot stand in the way of the plaintiff now seeking an amendment. If such an amendment is not now permitted and if both the plaintiff's claim based on the testament and the defendant's case that the properties were purchased benami in the name of Doraiswami Mudaliar for the benefit of the first defendant are rejected, then the plaintiff will necessarily be led to file a fresh suit for partition based on his right of inheritance. If, on the other hand, the defendant's contention is completely accepted, then the plaintiff will not be entitled to any relief in respect of the suit properties even if the amendment sought for by him is allowed. Therefore, the defendants are not in any way prejudiced by the addition of this alternative relief.

19. Lastly, Mr. Chandran submitted that as the plaintiff has not given up the relief of mandatory injunction, the addition of the alternative relief would be diametrically opposed to the said claim. According to him, one could understand the present prayer provided the plaintiff had given up his prayer for mandatory injunction. As already pointed out by Mr. T. R. Rajaraman, the grant of mandatory injunction would follow only in case the plaintiff's plea based on the testamentary right is accepted, and if the plaintiff is not entitled to the entire properties, the grant of the relief of mandatory injunction will not arise. Therefore, there is no substance in the last contention also.

20. For all these reasons, the revision petition is dismissed; but there will be no order as to costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and T. N. Singaravelu, JJ.*

Arumugham Chettiar ... *Appellant**

v.

Ganapathi Chettiar and others ... *Respondents.*

(A) *Deed—Construction—Partition deed—Inconsistency in terms—Clause in operative portion allotting A schedule property to father—Absolute right conferred—'B' and 'C' schedule properties allotted to sons—Later clause reciting that 'B' and 'C' schedules included a half share of the 'A' schedule property "which may come to them on the death of the father"—Absolute estate held to be conferred on father—Defeasance clause only a pious wish—Does not affect the absolute right.*

(B) *Contract Act (IX of 1872), section 16-A—Undue influence—Father excenting settlement deed in favour of the son who looked after him in his old age—No evidence of undue influence by that son—Settlement upheld.*

It is well-established that if there are two inconsistent provisions in a document the earlier clause giving an absolute right in the properties has to prevail. It is also well-established that a document should be read homogeneously and the earlier clause in the document should be given effect. In this case the subsequent clauses in the document

*A. No. 542 of 1977. *16th October*, 1981.

which take away the absolute right given to the plaintiff's father by the earlier clause should be taken to be a defesance clause and therefore to be only a pious wish. The subsequent clause can be taken to operate only in case where the plaintiff's father leaves the properties on his death without any alienation during his lifetime and not otherwise. [*Paras.* 10 *and* 11.]

Since the possibility of plaintiff's father having executed the settlement deed out of natural love and affection to the first defendant, and his sons cannot be ruled out and as there is no evidence of use of undue influence by the first defendant, the validity of the settlement deed has to be upheld. [*Para.* 12.]

Cases referred to:—
Govindaraja Pillai v. *Mangalam Pillai*, (1932) 63 M. L. J. 911 : 36 L. W. 733 : A. I. R. 1933 Mad. 80 ; *Ramachandra Shenoy* v. *Hilda Brito*, (1964) 2 S. C. R. 722 : A. I. R. 1964 S. C. 1323 ; *Abdul Rahiman Sahib* v. *Uthumansa Rowther*, A. I. R. 1925 Mad. 997: 85 I. C. 945 ; *Pugalum Perumal Pillai* v. *Thangathammal*, (1949) 1 M. L. J. 389 : 62 L. W. 260 : A. I R. 1949 Mad. 690 ; *Abdal Malick* v. *Md. Yousuf*, (1960) 2 M. L J. 355: A. I. R. 1961 Mad. 190.

Appeal against the decree of the Sub-Court, Tiruchirapalli, dated 17th October, 1974, in O. S. No. 106 of 1971.

K. Sarvabhauman and *K. Sampath*, for Appellant.

Ramalingam, *Kumar Rajaratnam* and *S. Thyagaraja Ayyar*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—The unsuccessful plaintiff in O. S. No. 106 of 1971, on the file of the Sub-Court, Tiruchirapalli, is the appellant herein.

2. He filed the suit for partition and separate possession of his alleged half share in the suit items 1 and 3 to 7 or in the alternative in items 1 to 6 and for accounting from 27th December, 1970. His case as set out in the plaint was as follows: The plaintiff is the younger brother of the first defendant and defendants 2 and 3 are the sons of the first defendant. Fourth defendant is an alienee of the plaint item 2 from the plaintiff's father. Fifth and sixth defendants are cultivating items 3 and 1 respectively. The plaintiff's father died on 27th December, 1970. There was a partition between the father of the plaintiff, the first defendant and the plaintiff on 26th February, 1959, under which items 1 to 6 were given to the plaintiff's father Subramania Chettiar for life with vested remainder in equal moieties to the plaintiff on the one hand and defendants 1 and 2 on the other. The plaintiff's father, however, sold the second item on 1st June, 1965, for a sum of Rs. 10,000 to the fourth defendant, but that sale is not binding on the plaintiff. In any event, the plaintiff's father having purchased the plaint item 7 from the sale proceeds of plaint item 2 on 3rd February, 1967, the said item 7 should be taken to have been substituted for item 2. The plaintiff's father was ailing for two years before his death and he was infirm both physically and mentally. Taking advantage of the physcial and mental infirmity of the plaintiff's father who was aged 75 and who was living with the first defendant, the first defendant has managed to bring into existence two settlement deeds, dated 2nd March, 1970, and 22nd May, 1970. The said settlement deeds are not true and genuine. Even if the settlement deeds are taken to be binding on the plaintiff who has acquired vested remainder under the partition deed, dated 26th February, 1959, the plaintiff is entitled to ignore the said settlement deeds and claim his half share therein. Under the two settlement deeds, dated 2nd March, 1970 and 22nd May, 1970, the plaintiff's father has purported to settle the plaint item 7 in favour of the first defendant and the southern half of item 5 to defendants 2 and 3. It is on these allegations the plaintiff sought the relief of allotment of his share in the suit properties as indicated above.

3. The suit was resisted by defendants 1 to 3 by rasing a common defence. They contended that under the partition deed, dated 26th February, 1959, the father was given absolute right with power of alienation in respect of the plaint items 1 to 6 and he has exercised that right during his lifetime by executing a sale of one item and settlement deeds in respect of others. The settlement deeds, dated

2nd March, 1970 and 22nd May, 1970, are true, valid and genuine and that the same had been executed by the plaintiff's father voluntarily and without any undue influence. Since the plaintiff's father had been given the absolute right in respect of the properties allotted to his share under the partition deed, dated 26th February, 1959, the plaintiff cannot question the alienations made by the father. The fourth defendant, alienor of plaint item 2 resisted the suit contending that the alienation was true and valid, that the plaintiff was aware of the alienation in his favour and that he having failed to challenge the same is bound by the same. Defendants 5 and 6 who are the lessees of some items of the suit properties remained *ex parte*. The fourth defendant who had filed a written statement subsequently remained *ex parte* at the stage of the trial.

4. On the above pleadings, the following issues came to be framed at the stage of the trial—

> "1. Whether the plaintiff's father, Subramania Chettiar was given only life interest under the registered document, dated 26th February, 1959, as set up by the plaintiff?
>
> 2. Whether the settlement deeds, dated 2nd March, 1970 and 22nd May, 1970, are binding on the plaintiff or vitiated due to any of the reasons alleged in the plaint?
>
> 3. Whether plaint item No. 7 is not self-acquisition of the plaintiff's father?
>
> 4. Is the plaintiff entitled to partition and accounting?"

5. The Court below, after analysing the evidance, held that under the partition arrangement, Exhibit A-1, dated 26th February, 1959, the plaintiff's father has been given absolute right in items 1 to 6 of the plaint schedule which had been shown as A schedule in Exhibit A-1, partition deed. On the second issue, the Court below held that the settlement deeds, Exhibits B-5 and B-6 were true and genuine and that the same are not vitiated due to any of the reasons alleged in the plaint. On the third issue the Court below held that the plaintiff's father had purchased plaint item 7 for Rs. 12,000 on 3rd February, 1967, under Exhibit B-4 and the said property is the absolute property of the plaintiff's father and that, therefore, the settlement deed, Exhibit B-5 executed by him covering those properties in favour of the first defendant is valid and binding on the plaintiff. The Court below also held that the settlement deeds, Exhibit B-6 under which some items have been given to defendants 2 and 3 by the plaintiff's father are also valid and binding on the plaintiff. In view of the findings on the above issues, Court below held on issue No. 4, that the plaintiff is not entitled to the relief of partition or for accounting. In this view the suit came to be dismissed.

6. In this appeal the learned counsel for the appellant submits that the Court below is in error in holding that the plaintiff's father Subramania Chettiar was the absolute owner of the properties settled on him under Exhibit A-1, that the Court below has not properly interpreted the recitals in Exhibit A-1, that on a proper interpretation of the recitals in Exhibit A-1, it has to be held that the properties set out in schedule A of Exhibit A-1, were given to the plaintiff's father only for his life with a vested remainder for both the sons on the death of the plaintiff's father and that even assuming that Subramania Chettiar was allotted items 1 to 6 of the plaint schedule absolutely under the partition deed, Exhibit A-1 the settlement deeds said to have been executed by him are void and not binding on him as they have been executed while he was infirm both physically and mentally and while he was living with the first defendant under his dominating influence.

7. The appellant plaintiff has examined himself as P. W. 1, and three other witnesses as P. Ws. 2 to 4 who are the pangalis of his father to prove that the plaintiff's father was bedridden for one year before his death on 27th December, 1970. The first defendant has examined himself as D. W. 1 apart from examining D. Ws. 2 to 5. D. W. 2 is an attestor and identifying witness to Exhibit B-5 settlement deed for plaint item 7 executed on 2nd March, 1970. He is also the co-brother of the first defendant. The other attestor to Exhibit B-5 settlement deed is one Arumugham, a pangali of the plaintiff's father. D. W. 3, is the scribe of Exhibit B-5 settlement deed and D. W. 4 is the scribe of Exhibit B-6

settlement deed. The settlement deed, Exhibit B-6 has been registered at Trichi and Exhibit B-5 settlement deed was executed at Musiri. D. Ws. 2 and 3 have spoken to the due execution and attestation of Exhibit B-5 settlement. They have also deposed that Exhibit B-5 settlement was voluntarily executed out of his own free will by the plaintiff's father while he was in a sound and disposing state of mind with full knowledge of its contents. As already stated, D. W. 2 is the attestor and identifying witness to Exhibit B-5 settlement deed and he is the co-brother of the first defendant. Similarly the execution of Exhibit B-6 has been duly spoken to by D. W. 4 the scribe. He has also deposed that Exhibit B-6 settlement deed was executed by the plaintiff's father of his own free will while he was in a sound and disposing state of mind There is no medical evidence adduced by the plaintiff to substantiate his assertion that his father was infirm both physically and mentally at the time of the execution of Exhibit B-5 and B-6 settlement deeds. In the light of the said oral evidence which is sufficient to prove the due execution of the settlement deeds by the plaintiff's father, the other question that remains to be considered as regards the settlement deeds is whether they are vitiated by undue influence.

8. Before dealing with the above question, we would like to dispose of the main question as to whether the A schedule properties allotted under Exhibit A-1 partition to the plaintiff's father are his absolute properties or whether the said properties have been given to the plaintiff's father to be enjoyed during his life time. Exhibit A-1 is the partition deed in which the A schedule property has been allotted to the plaintiff's father. Items 1 to 6 of the suit properties have been included in the A schedule to Exhibit A-1. That the plaint items 1 to 6 have been allotted to the plaintiff's father in the partition is not in dispute now. The question is whether he has got a life interest in those properties as alleged by the plaintiff or whether he takes the allotted properties absolutely. The operative portion of Exhibit A-1 partition deed dealing with the allotment of properties says—

சர்வசுதந்திரத்துடன் சர்க்கார் தீர்வை முதலானதும் செலுத்திக்கொண்டு தானாதி வினிமய விக்கிரயங்களுக்கு யோக்கியமாய் புத்திர பௌத்திர பாரம் பரியமாய் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது.''

The above extract clearly indicates that A, B and C schedule properties allotted to the various sharers will be enjoyed by them absolutely from son to grandson with powers of alienation. Subsequently the document provides—

1 இலக்கமிட்டவர் ஆயுளுக்கு பின் ஏ ஷெடியூலில் காட்டியிருக்கும் சொத்துக்களை பி சி ஷெடியூல் காரர்கள் சமமாகப் பிரித்துக் கொள்ள வேண்டியது.

1 இலக்கமிட்டவருடைய ஏ ஷெடியூல் பாகத்தை மற்ற' பி சி ஷெடியூல் காரர்கள் பிரித்துக் கொள்ளும் சொத்துக்களை அவரவர்களுக்கு சர்வ சுதந்திரத்துடன் தானாதி விக்கிரயங்களுக்கு யோக்கியமாய் சர்க்கார் தீர்வை செலுத்திக் கொண்டு அனுபவித்துக் கொள்ள வேண்டியது.”

The B and C schedules which have been allotted to the first defendant and the plaintiff also contain a half share in the A schedule which may come to them on the death of their father. Thus if the recitals given in the schedules are alone to be taken into account, then Subramania Chettiar to whom A schedule properties have been allotted can be taken to be only a life estate holder with no absolute rights over the properties. However, we are not inclined to proceed only on the basis of the recitals contained in the schedule. The reason for including half share in the *A* schedule properties in B and C schedules is given in the following passage occurring in paragraph 4 of the document.—

இந்த ஷெடியூல் சொத்தை மேற்படி சுப்ரமணியன் செட்டியார் ஆயுள்வரை அனுபவித்து வந்து மேற்படியார் ஆயுளுக்குப் பிறகு பி சி ஷெடியூல் காரர்கள் சமபாகமாக அனுபவித்து வேண்டியிருப்பதால் மேற்படி மதிப்புகளை பி சி ஷெடியூலில் சேர்க்கப்பட்டிருக்கிறது.

9. According to the learned counsel for the appellant expression ஆயுள்வரை அனுபவித்து வந்த occurring in the above extract would clearly indicate that Subramania Chettiar has been given rights to enjoy the properties during his life-time and he has an absolute right to alienate the properties. It is no doubt true that the extract given above if taken at the sole consideration, Subramania Chettiar can be taken to have only a life interest. But the above extract has to be read along with the earlier operative portion in the document where all the sharers have been given an absolute right in the properties allotted to each of them. The expression

சர்வ சுதந்திரத்துடன் சர்க்கார் தீர்வை முதலானது செலுத்திக்கொண்டு தானாதி வினிமய விக்கிரயங்களுக்கு யோக்கியமாய் புத்திரபௌத்திர பாரம் பரியமாய் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது.

would indicate that the sharers are to take the properties allotted to them absolutely.

10. It is well-established that if there are two inconsistent provisions in a document the earlier clause giving an absolute right has to prevail. It is also well established that a document should be read homogeneously and the earlier clauses in the document should be given effect. If we consider the document Exhibit A-1 in this light, the expression

ஆயுள்வரை அனுபவித்து வந்த மேற் படியார் ஆயுளுக்குப் பிறகு பி சி ஷெடியூல்காரர்கள் சமபாகமாக அனுப விக்க வேண்டியது.

occurring in that last portion of the document can only be taken as providing for devolution of interest if the properties are left by Subramania Chettiar undisposed on his death. This is the view taken by the Court below and we do not see any reason for interfering with the said interpretation which is consistent with the various rules of interpretation of documents. The learned counsel for the appellant relies on the decisions of this Court in *Govindaraja Pillai* v. *Mangalam Pillai and others*[1] and *Ramachandra Shenoy and another* v. *Hilda Brito and others*[1], in support of his submission that the latter clause dealing with the devolution of interest after the death of the plaintiff's father should be taken to be a gift over without diminution. The first case arose out of a pre-nuptial agreement, wherein the wife died without any issue and so it was held that the brother of the wife takes absolutely the properties of the deceased after making a distinction between the repugnant provision and defeasance clause. In the second case it was held that the daughter gets only a life estate and on her death her sons take her properties absolutely. The decision in that case is based on the recitals in the document which came up for consideration in that case. The above decision may not therefore, be useful to the appellant.

11. The learned counsel for the respondents on the other hand, relies on the decision in *Abdul Rahiman Sahib* v. *Uthumansa Rowther and others*[2] and *Pugalum Perumal Pillai* v. *Thangathammal*[3], in support of his contention that once an absolute title has been granted that right cannot be curtailed by the subsequent defeasance clauses in the document. In the first case a Muslim father gave absolute gift to his two sons in the earlier clause of the document but in the later clause purported to restrain the power of alienation and gave the same property to his grandsons absolutely. It was held that the later clause is repugnant to the former and should not be given effect to treating the later clauses as only a pious wish. It the second case, Govinda Menon, J., speaking for the Bench held that a later clause in a gift deed which is repugnant to the earlier one creating an absolute interest is void and unenforceable. We are of the view that in this case the subsequent clause in Exhibit A-1 which take away the absolute rights given to the plaintiff's father should be taken to be defeasance clause and therefore it should be taken to be only a pious wish. The subsequent clause can be taken to operate only in cases where the plaintiff's father leaves the properties on his death without any alienation during his life-time and not otherwise.

1. (1932) 63 M. L. J. 911 : 36 L. W. 733 : A. I. R. 1933 Mad. 80.

1. (1964) 2 S. C. R. 722 : A. I. R. 1964 S. C. 1323.
2. 85 I. C. 945 : A. I. R. 1925 Mad. 997.
3. (1949) 1 M. L. J. 389 : 62 L. W. 250 ; A. I. R. 1949 Mad. 690.

12. This leads us to the next question as to whether the settlement deeds, Exhibit B-5 and B-6, have been brought about by the first defendant by exercising under influence over the plaintiff's father. It is no doubt true that the plaintiff's father was 75 years old at the time of his death and that even after the partition under Exhibit A-1 he was living with the first defendant and that the first defendant was taking care of him. Merely because the first defendant was looking after his father in his old age it cannot be taken advantage of by the plaintiff to say that the first defendant had dominating influence over his father. As a matter of fact, after the partition under Exhibit A-1, the plaintiff's father has chosen to sell item 2 of the suit properties which has been allotted to him and later on chosen to purchase another irem of property instead. This shows that the plaintiff's father was in a position to attend to his own affairs without any help or advice from the first defendant. Though in this case the plaintiff has attacked the validity of the settlement deeds, Exhibits B-5 and B-6, on the ground that they have been brought about by exercise of undue influence, the sale of item 2 and the purchase of item 7 by the plaintiff's father has not been questioned as having been brought about by undue influence. This would indicate that the plaintiff's father was in a position to manage his own affairs without reference to the first defendant. Though it is alleged that the plaintiff's father was infirm both physically and mentally, no evidence worth mentioning has been adduced. Therefore, it has to be assumed that the plaintiff's father was not mentally and physically infirm at the time when he executed the settlement deeds. From the mere fact that the first defendant is the son of the executant of the settlement deeds, Exhibits B-5 and B-6, it is not possible to infer that the first defendant had a dominating influence over his father. Even assuming that the first defendant as the son was looking after his father and as such had some influence over the father's actions, it has not been shown to be an undue influence. It is true that the settlement deed Exhibit B-5 has been executed in favour of the first defendant and Exhibit B-6 has been executed in favour of his sons, defendants 2 and 3. But from that fact alone undue influence cannot be inferred. It may be that the plaintiff's father who has been looked after by the first defendant ever since the date of partition under Exhibit A-1 had intended to give his absolute properties obtained on partition to him and his sons. As already stated, D. Ws. 2, 3 and 4 have deposed that the father Subramania Chettiar had executed the settlement deeds voluntarily of his own free will and accord and there was no compulsion of undue influence. Since the possibility of the plaintiff's father having executed the settlement deeds out of natural love and affection to the first defendant and his sons cannot be ruled out and as there is no evidence of the first defendant using undue influence, we have to uphold the validity of the settlement deeds in this case.

13. The learned counsel for the appellant seeks to rely on the decision of a Division Bench of this Court in *Abdul Malick* v. *Md. Yousuf*[1], in support of his submission that on the facts of this case a presumption of undue influence arises and the onus is on the first defendant to prove that the settlor acted independently. In that case, a child had executed a gift in favour of the parent. While dealing with the question of presumption of undue influence the Court pointed out that the mere existence of fiduciary relation between the donee and donor raises the presumption of undue influence and the Court will hold the transaction to be bad unless the presumption is rebutted by cogent evidence adduced by the donee, that the transaction being in the nature of bounty from a child in favour of the parent, the presumption of undue influence arose and that the special relations like parent and child, solicitor and client, doctor and patient, guardian and ward, spiritual adviser or clergyman and parishioner constitute protected classes because the law throws a mantle of protection round them by raising a rebuttable presumption of undue influence. The facts of that case may not apply to the facts of the case before us ; here it is the father who had given his absolute properties to one of his sons and his son's sons. As already pointed out, the settlor was looked after by the first defendant in his old age and the father in all probability might have liked to benefit the first defendant by settling the properties on him. In this view of the matter, we do not see any justification for interfering with the conclusion arrived at by the Court below. The appeal is, therefore, dismissed with costs.

R. S. —— *Appeal dismissed.*

1. (1960) 2 M. L. J. 355: A. I. R. 1961 Mad 190.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Shanmukham, J.*

Narayana Guruviah Chetty's Estate and Charities by its Trustees P. Manavala Chetty and others ... *Petitioners**

v.

K. V. Venkateswaran and another ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control Act (XVIII of 1960), section 2—Trusts—Notification exempting public trusts from the Act—Object of concerned trust to help poor Vaisyas and Brahmins for upanayanam and marriages, feeding of Swamis in Temple daily, sinking or renovating drinking water wells for the use of the public etc.—Constitution of trust held to be of public trust only—Suits by the trust for ejectment of the defendants maintainable.

Held: The predominant purpose of the trusts is to carry out the charities mentioned in the document. It is only a public trust and it is entitled to claim exemption of Government order G. O. No. 2060 dated 16th August, 1976. In event the trusts are entitled to maintain the suits and claim ejectment of the defendants in both the suits. [*Para.* 6.]

Case referred to:—

M. Kesava Gounder v. *D. C. Rajan*, (1976) 1 M. L. J. 56 : 89 L. W. 205 : A. I. R. 1976 Mad. 162..

Petitions under section 115 of Act V of 1908 to revise the orders of the Small Cause Court, Madras (IV Judge), dated 24th March, 1979, in Ejectment Suit Nos. 76 and 78 of 1976 respectively.

P. K. Sivasubramaniam and *C. Ramakrishnan*, for Petitioners.

M. R. Krishnan and *V. S. Venugopal Mudali*, for Respondents.

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*C. R. P. Nos. 1942 and 1876 of 1981.
24th December, 1981.

The Court delivered the following

JUDGMENT.—At the time when these two ejectment suits were filed (Ejt. S. Nos. 76 and 78 of 1976), even private trusts were exempted from the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act. But, pending the suits, the particular Government Order, was amended extending the privilege only to the public trusts.

2. The short question that arises for consideration in these two revision petitions is :—

Whether the plaintiff is a public trust entitled to claim the benefits of the above exemption? The learned IV Judge, Court of Small Causes held :—

> "Therefore, there can be no doubt that the plaintiff-trust is both a private as well as a public trust ; and
>
> A careful perusal of Exhibit P-10 shows that the trust is a predominantly private trust".

In the above view, the learned Judge dismissed both the suits.

3. As against the said dismissal of the suits, the plaintiff has come foward with the above revision petitions. The contention of the learned counsel for the petitioner is that in view of the testator's definite indication that his chief object was that the good services of gifts and charities should be conducted permanently and properly, that as per the statement of accounts marked as Exhibit P-14, for the years 1976 to 1978 not a single payment was made to any relation mentioned in Exhibit P-10 that all the funds of the trust were utilised for public charities as indicated in Exhibit P-10 numbering as items 70 to 88, and in view of the further fact that the payments directed to be made in Exhibit P-10 under clauses 11 to 69 are all donations directed to be made by the testator to his relations, and that, as the donees have passed away, there is no need to make any payment as directed by the testator, the trust should be deemed to be a public trust.

4. I find there is every force in every one of the points urged by learned counsel for the

petitioner. A reference to items 11 to 69 in Exhibit P-10 would show that they are personal gifts to the persons indicated therein and with the passing away of every one of the donees, the purpose got terminated. *Per contra*, the direction as regards carrying out the trust subsists for ever. Then it is beyond doubt that the predominant purpose is to carry out the charities as indicated by the testator in Exhibit P-10 and such charities include establishment of Ramanujakootams at (1) Madras, (2) Srivilliputtur, (3) Mannargudi, and (4) Tiruppakuli, establishment of one elementary school in Madras and two other schools in the mofussil, affording help to poor Vysyas and Brahmins for Upanayanams and marriages, affording financial help by way of small monthly payments to poor and infirm Vysyas, other charities, such as feeding of 8 Swamis daily in Sri Ranganathaswami temple in the Mullah Sahib St., Madras-1, performance of sundal and dadyodanam, etc., kainkaryams in selected temples, sinking or renovating drinking water wells for the use of the public, etc. Further, even according to the testator, this is the chief object with which he has created the trust. If these aspects are taken into consideration, there can be no doubt that what was endowed under Exhibit P-10 is to carry out public charities in which event the trust will be a public trust.

5. It is useful to refer to the decision reported in *M. Kesava Gounder* v. *D. C. Rajan*[1], in which a Division Bench of this Court had ruled that if the purposes of the trust were to be for the advancement of the religion, knowledge, commerce, health, safety and other objects beneficial to the mankind, certainly it will be a public trust. The beneficiary may be limited to a particular section of a community and need not necessarily be the community at large. This above principle is reiterated in the same decision, referred to above.

6. In view of the foregoing, I have no hesitation to hold that the plaintiff-trust is a public trust; and therefore, it is entitled to claim exemption of the Government Order G. O. No. 2000, dated 16th August, 1976. In that event, they are entitled to maintain the suits and claim ejectment of the defendant in both the suits as prayed for.

7. The result is, the civil revision petition is allowed, the judgments and decrees of the Court below in ejectment suits O. S. Nos. 76 and 78 of 1976 are set aside and the suits are decreed. So far as the costs are concerned, I direct both the parties to bear their respective costs throughout. In the circumstances, the defendant in both the suits is given three months' time to vacate.

R. S. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Santhamani ... *Petitioner**

v.

S. N. Somasundaram ... *Respondent.*

Civil Procedure Code (V of 1908), Order 5, rule 9 and Order 9, rule 13 and Hindu Marriage Act (XXV of 1955), section 13—Petition for divorce by husband against wife —Notice served on the respondent by post—"Respondent called, absent, set ex parte*"—Evidence recorded and petition ordered—Petition to set aside* ex parte *order—Plea of summons not being served—Dispute as to signature on the postal acknowledgment—Handwriting expert submitting report and tendering evidence—Same not accepted—Duty of Court under the Evidence Act pointed out.*

(B) *Evidence Act (I of 1872), section 165—Scope and applicability.*

1 (1976) 1 M.L.J. 56 : 89 L.W. 205: A.I.R. 1976 Mad. 102.

*C.R.P. No. 1290 of 1980.

21st January, 1982.

This civil revision petition was filed by the wife against an appellate ord erconfirming the trial Court's order refusing to set aside an *ex parte* order passed against her. She had alleged right from the initial stage to the stage of revision, that she had not received summons of the petition that had been filed against her by her husband before the trial Court under section 13 of the Hindu Marriage Act praying for divorce on the ground of adultery.

Held: No convincing reason had been given by both the Courts below for rejecting the evidence of P. W. 1 when she had specifically stated that summons had not been received by her. Her evidence had not been properly put to test for disbelieving the same. This Court has therefore to allow the petition *in toto* and set aside the order refusing the prayer for setting aside the *ex parte* decree. [*Para.* 15.]

It is gross failure to exercise the jurisdiction vested in the trial Court, in that the trial Court had failed to make use of the provisions under section 165 of the Indian Evidence Act, and further enlighten itself irrespective of the fact whether evidence was made available by either side or not, in order to get at the truth with respect to the entire aroma that had been created due to the existence of a signature alleged to be not petitioner's signature. [*Para.* 12.]

Cases referred to:—

Bipinchandra Shah v. *Prabhavathi*, 1957 S. C J. 144 : 1956 S C. R. 838: A. I. R. 1957 S. C. 176 ; *Nataraja Iyer* v. *Nacharammal*, 89 L. W. 609 : (1977) 1 M. L. J. 47 : A. I. R. 1977 Mad. 221 ; *Anaithalayan* v. *Marudamuthu*, (1953) 1 M. L. J. 302 : 66 L. W. 151 : A I. R. 1953 Mad. 528.

Petition under section 115 of Act V of 1908 to revise the order of the District Court, Coimbatore, dated 23rd February, 1980 in C. M. A. No. 70 of 1979 in I. A. No. 1324 of 1977 in O. P. No. 110 of 1976, II Additional Sub-Judge, Coimbatore.

M. R Narayanaswami, for Petitioner.

S. Gopalaratnam, for Respondent.

The Court made the following

ORDER.—This is a revision petition filed by the wife (respondent in O. P. No. 110 of 1976) alleging from the initial stage to this stage of revision, that she had not received summons in this case of a petition that had been filed by her husband before the trial Court under section 13 of the Hindu Marriage Act, 1955, praying for divorce, on the ground of adultery.

2. Mr. M. R. Narayanaswami, the learned counsel for the petitioner, submits that the signature found in Exhibit C-1 the postal acknowledgment, was contested as one not having been put by the petitioner herein, and as a matter of fact, one V. D. Mahajan, a handwriting expert had been asked to submit his report and that the said report which was in favour of the petitioner, was also submitted to the Court, but for reasons best known to both sides, the same had not been accepted in this case.

3. The petitioner had examined herself as P. W. 1 and on behalf of the respondent, one Isaac, the postman concerned with Exhibit C-1 was examined as R. W. 1 and one R. Govindaswami Pillai was examined as R. W. 2. Exhibit-A is the draft letter of Exhibit B in the letter-head of K. P. Muthuswami Gounder and Brothers, filed on behalf of the petitioner. On behalf of the respondent, Exhibits B-1 to B-4, were filed before the trial Court. Exhibit C-1 dated 12th May, 1976, is the postal acknowledgment in O. P. No. 110 of 1976 filed by the respondent herein for divorce as mentioned above.

4. I. A. No. 1324 of 1977 in O. P. No. 110 of 1976, as already mentioned, was filed by the revision petitioner herein under Order 9, rule 13, Civil Procedure Code before the trial Court to set aside the *ex parte* order passed against her in O. P. No. 110 of 1976 on 9th July, 1976, which petition was filed, as already mentioned, under section 13 of the Hindu Marriage Act, 1955.

5. It is relevant in this connection to note that the above O. P. No. 110 of 1976 was filed by the husband against his wife, the revision petitioner herein, praying to pass a decree of divorce on the ground of adultery

as mentioned above. Notice was ordered in the said petition by the learned Second Additional Subrodinate Judge, on 29th April, 1976, by 22nd June, 1976. The respondent, the revision petitioner herein, according to the trial Court, was served by post, on 12th May, 1976. This is the docket entry of the trial Court, dated 22nd June, 1976. Thereafter, on 22nd June, 1976, it is seen from the entries in the docket of the petition "Respondent called, absent, set *ex parte*. Evidence 28th June, 1976". This entry was made on 22nd June, 1976, by the learned Subordinate Judge. On 28th June, 1976, the evidence of P. W. 1 was recorded, Exhibits A-1 and A-2 were marked, and for further evidence at the request of the learned counsel for the petitioner, it was adjourned to 3rd July, 1976. This endorsement is found as against the date 26th June, 1970, in the docket entry. On 3rd July, 1976, as the petitioner was not ready, the petition was adjournrd to 9th July, 1976. On 9th July, 1976, P. W. 2 was examined, and it was mentioned in the docket entry that the claim was proved and that the petition was allowed as prayed for with costs. This entry is found as against the date 9th July, 1976, in the docket. It is needless to say that a separate order had been written by the trial Court as against which, it is common ground, no appeal has been preferred. The said order also does not contain any other matter than the docket entry that is incorporated there. We are not very much concerned about the order, because it is only the judgment in C. M. A. No. 70 of 1979 of the learned District Judge who sat in appeal against the order in I. A. No. 324 of 1977, that is the subject of scrutiny under the provisions of section 115, Civil Procedure Code. We are now concerned in this revision petition with the question as to whether this Court could interfere by virtue of the power vested with it under section 115 of the Civil Procedure Code to revise the judgment of the learned District Judge or to uphold the stand that had been taken by means of the judgment in appeal made by the learned District Judge.

6. Mr. M. R. Narayanaswami, the learned counsel for the petitioner, attacked the judgment of the lower appellate Court on the ground that it had not applied its mind in the proper perspective with respect to the question that loomed large before it, but had taken into consideration many extraneous matters which were not quite relevant and germane to the point at issue. In developing this argument Mr. M. R. Narayanaswami has also gone deep into the pleadings. As a matter of fact, at one stage, his rhetorical contention was that the *ratio decidendi* imbedded in the decision of the Supreme Court in *Bipinchandra Shah* v. *Prabhavathi*[1], with respect to standard of proof that is required with respect to *animus deserendi* was not taken into consideration at all by the lower appellate Court and when the decree is one which has the effect of completely severing the matrimonial tie between spouses, the lower appellate Court ought to have applied its mind dealing wiih the order of the trial Court in appeal and viewed the matter in the proper perspective. In other words, Mr. M. R. Narayanaswami contends that as per the provisions of section 23 of the Hindu Marriage Act, 1955, the proof contemplated itself shows the gravity of the question involved in a petition filed under section 13 of the Hindu Marriage Act, 1955, and the failure to have all these before it in construing the matter under Order 9, rule 13, Civil Procedure Code, in the light of the provisions of Order 5, rule 9, Civil Procedure Code, clearly gives jurisdiction to this Court to interfere under section 115, Civil Procedure Code, and nullify the effect of the decision that had been rendered by way of judgment on appeal over the order that had been pronounced by the trial Court in I. A. No. 1324 of 1977. In this regard, Mr. M. R. Narayanaswami has also taken me through the contents of Exhibit C-1 His main point of attack with respect to this document is that when the signature said to have been put by P. W. 1 in it had been stoutly denied by her in her evidence and when there is an expert opinion available in the records, though not exhibited as evidence, is it not the duty of the trial Court to have exercised its jurisdiction under section 169 of the Indian Evidence Act, 1872, and got itself enlightened so as to decide the question relating to the aspect of setting aside the *ex parte* decree that had been pronounced by it? This question that emanates as a point of law cannot be brushed aside lightly as one which is without substance, especially when there is an attack on the signature found in

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1. 1957 S. C. J. 144 : 1956 S. C. R. 838 ; A. I. R. 1957 S. C. 176.

Exhibit C-1 emanating from the petitioner, who is alleged to be the author of the same. It is common ground that the opinion expressed by the handwriting expert which of course formed part of the testimony here as a material by way of evidence available on record, has not been exhibited. The opinion of the handwriting expert was to the effect that the signature found in Exhibit C-1 is not the one put by the person who signed the subsequent signatures which were the subject-matter of scrutiny by him. The rhetorical contention that had been pressed into service by Mr. M. R. Narayanaswami is that the failure to take into consideration the said report thus submitted before the Court by a competent expert relating to handwriting ought to have been the subject-matter of action or proceeding by the Court itself by putting relevant questions to the relevant witnesses who were available and the failure to exercise such a jurisdiction vested with it both under section 165 of the Indian Evidence Act, 1872, as well as *suo motu* especially when the opinion of the expert is available before Court and there is a categorical assertion on the part of P. W. 1 that the signature found in Exhibit C-1 is not her signature, requires this Court to interfere with the judgment which is subject-matter of this revision, *viz*, the one pronounced on appeal by the learned District Judge. This Court had perused both the judgment under revision as well as the order that has been responsible for the emanation of the C. M. A. before the lower appellate Court.

7. The point for consideration is, whether the failure to take into consideration the expert opinion offered by the handwriting expert which is available on record of course not as evidence, but as one that had come into existence during the course of the proceedings in that it came into existence subsequent to the filing of the petition at the instance of the petitioner herein, requires the Court itself to take into consideration the genuineness or otherwise of the plea thus emanating from P. W. 1 regarding her signature found in Exhibit C-1 especially when Exhibit C-1 is a Court document.

8. Mr. S. Gopalaratnam, the learned counsel for the respondent vehemently contends that the argument advanced on behalf of the petitioner herein cannot be upheld by the Court in view of the fact that it is for the petitioner herein to prove that the signature found in Exhibit C-1 is not her signature, and it is not for the Court, *suo motu* to indulge in an enquiry which is extraneous to the point at issue. In other words, he submits that the jurisdiction contemplated under section 165 of the Indian Evidence Act, 1972, cannot be said to have been in any way attracted in the present case. Mr. Gopalaratnam also referred to the decision of this Court rendered by Venkataraman, J. in *Kotha Chelliah* v. *Alwartah Chetti and Sons*[1].

9. Mr. M. R. Narayanaswami, the learned counsel for the petitioner, referred to the decision of this Court (Suryamurthy, J.) in *Nataraja Iyer* v. *Nacharammal*[2]. Both these decisions were with respect to Order 5, rule 9, clause (2) of the Civil Procedure Code (service of summons by post). It is submitted by Mr. Gopalaratnam that the view taken by Venkataraman, J, has to be (*sic*) applied by this Court and that the view taken by Suryamurthy, J., is not applicable to the facts of this case, because the said decision emanated on the basis of facts which are distinguishable from the facts in the present case. Mr. Gopalaratnam also referred to the decision in *Anaithalayan* v. *Marudamuthu*[3], for the proposition that the failure to take an acknowledgment or to affix the summons as contemplated under Order 5, rule 17, Civil Procedure Code, is cured by the proviso to Order 9, rule 13, Civil Procedure Code, enacted in Madras, though the provisions of Order 5, rule 17 may be mandatory.

11. Order 9, rule 13 of the Civil Procedure Code, as amended by the Madras High Court reads as follows :—

> "13 (1). In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside

1. A. A. O. No. 178 of 1971.
2. 89 L.W. 609 : (1977) 1 M. L. J. 47 : A. I. R. 1977 Mad. 221.
3. (1953) M. L J. 302 : 66 L. W. 151 ; A. I. R. 1953 Mad. 528.

the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing, and had sufficient time to appear and answer the plaintiff's claim.

(2) The provisions of section 5 of the Indian Limitation Act, 1908 shall apply to applications under sub-rule (1).

Explanation.—Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree.

Order 5, rule 9 of the Civil Procedure Code, reads as follows—

"9 (1). Where the defendant resides in India, whether within or without the jurisdiction of the Court in which the suit is instituted, the Court may direct the proper officer to cause a summons under this order to be addressed to the defendant at the place, where he ordinarily resides or carries on business or works for gain, and sent to him by registered post prepaid for acknowledgment.

(2) Where the summons is returned unserved or the defendant does not appear on the day fixed in the summons, the Court may direct that summons shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant.

(3) The proper officer may be an officer of a Court other than that in which the suit is instituted and where he is such an officer, the summons may be sent to him by post, or in such other manner as the Court may direct.

(4) Notwithstanding anything contained in sub-rule (1), where proceedings in Court are taken for—

(*i*) issue of an injunction, or

(*ii*) punishment of a party for contempt of Court, or

(*iii*) bringing to sale any property in execution of a decree or order of Court, notices shall be served only in the manner provided for in sub-clause (2)."

12. In the instant case, as already mentioned, we are not concerned with the issue involved in the petition and as the case had been disposed of *ex parte*, we need not go in to the averments made in the petition or the contentions raised in the counter. What we are now concerned is, whether the ingredients of Order 9, rule 13, Civil Procedure Code, have been satisfied so as to set aside the *ex parte* decree that had been passed by the trial Court. Viewing the entire submissions that have emanated from either side as well as the record available by way of evidence now before this Court, this Court comes to the conclusion that the judgment under revision requires treatment under section 115 of the Civil Procedure Code, favourable to the petitioner, *viz.*, the wife (respondent in the O. P.). When the wife, the revision petitioner herein, has specifically averred and also went into the box as P. W. 1 and deposed to the effect that the signature found in Exhibit C-1 is not her signature, however much there might have been evidence let in by the other side or there was a flagrant failure on the part of the petitioner (P. W. 1), to examine her father who was available in the very precincts of the Court, it does not in any way afford as a ground for the failure of the trial Court to exercise its jurisdiction under section 165 of the Indian Evidence Act, 1872, and put some questions and to get the report of the hand-writing expert exhibited as a Court exhibit and proceed in the matter and arrive at a decision. This is what exactly is contemplated by the procedural law of the land

in conjunction with the basic principles of the law of evidence, *viz.*, the Indian Evidence Act, 1872. If this is not a case to be dealt with under section 165 of the Indian Evidence Act what else can be the case to be dealt with by means of interrogatories? The Court has got the power to probe into the matter, of course, well within its jurisdiction and come to a conclusion independent of the extraneous circumstances that may come and indulge in wheeling the actual state of affairs. This is what is expected by the provisions of the Code of Civil Procedure as due process of law. In the instant case, it is a gross failure to exercise the jurisdiction vested with the trial Court, in that the trial Court has failed to make use of the provisions under section 165 of the Indian Evidence Act, and further enlighten itself, irrespective of the fact whether evidence was made available by either side or not, in order to get at the truth with respect to the entire aroma that had been created due to the existence of a signature which is alleged to be not the petitioner's signature.

13. Mr. Gopalaratnam, the learned counsel for the respondent, finally submitted that for sending the summons, it is not the respondent herein, *viz.*, the husband, who is responsible, but it is the Court and its office which sends summons through post, and as such, there cannot be any stigma attached to the proceedings which had been actually initiated at the instance of an officer of the Court, *viz.*, the Nazir's section, or any other officer, who is responsible for posting the same. In other words, he submits that the evidence of the postman as R. W. 1 is sufficient to dispel any doubt relating to the signature in Exhibit C-1, because the specific evidence emanating from R. W. 1 is to the effect that the signature was put in his presence by P. W. 1 and that in token of the same, another person's signature was also obtained on it Who is that another person?. There is certainly a vacuum around the signature that is found in Exhibit C-1. Is it a male or a female? Who is he? Why no question had been put under section 165 of the Indian Evidence Act by the trial Court to R. W. 1 with respect to this? Can the Court simply keep quiet on what has emanated and discuss about the same later on in its judgment? Certainly not. The provisions under section 165 of the Indian Evidence Act had been incorporated for the purpose of enabling the Court to get enlightened then and there with respect to any reasonable doubt that is created in its judicial mind. As a matter of fact, a reading of section 165 of the Indian Evidence Act, 1872, clearly shows that not only relevant, but even irrelevant questions can be asked, provided that the question emanates at the spur of the moment from the Court so as to get itself enlightened, because there is nothing like enlightenment in a case by way of evidence recorded at the instance of the Court itself when the Court finds it difficult to get at the crux of the matter, especially when both sides are unable to help it. Therefore, when this strong weapon with which the Court is armed under section 165 of the Indian Evidence Act, 1872, is not utilised for proper purposes under the critical circumstances, certainly, it amounts to failure to exercise the jurisdiction with a Court which requires interference by the Court.

14. The next point that is urged by Mr. S. Gopalaratnam, the learned counsel for the respondent, is that the certified copy of the expert's report was available with the revision-petitioner herein on 25th November, 1978 itself, there is absolutely no explanation offered by the revision-petitioner herein as to why she had kept quiet till 12th January, 1979, the day on which she had been examined as P. W. 1. I am unable to find any substance in this argument because the document is not before this Court now at this stage as a piece of evidence. The fact remains that it forms part of the immaterial record. Mention is made in this order, not by way of appreciating any evidence or contents therein, but as a fact of the existence of the same in the record of this case. Under the circumstances. the contention in this regard is rejected as untenable.

15. I have absolutely no ground to disbelieve the evidence of P. W. 1 who is the wife and in whose absence this O. P. had been ordered setting her *ex parte* and disrupting her sacramental union with the respondent. Nothing has been brought to my notice even at this stage by the learned coonsel for the respondent as to why the evidence of P. W. 1

should not be believed. The evidence available on record, both oral and documentary, clearly shows that her petition ought to have been allowed by the lower Courts by believing her evidence. But, both the Courts below have missed the salient features of the prayer that had been emanating from the wife (the revision-petitioner) and have proceeded to discuss something which is absolutely not germane to the point. As already stated, no convincing reason had been given by both the Courts below for rejecting the evidence of P. W. 1, when she has specifically stated that summons had not been received by her. Her evidence had not been properly put to test for disbelieving the same. This makes this Court to allow the petition *in toto* and set aside the order refusing the prayer for setting aside the *ex parte* decree in the O. P. Under these circumstances, the revision petition is allowed. There will be no order as to costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Swamikkannu, J.*

V. S. Parthasarathy Mudaliar ... *Petitioner**

v.

The Authorised Officer (Land Reforms), Kancheepuram ... *Respondent.*

Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act (XVII of 1970), sections 15, 73 (vii) *and 78—Authorised Officer revising his earlier order and making fresh assessment regarding determination of exemption—Not permissible under section 15—Section 78, if applicable.*

The only point for consideration in the civil revision petition was whether the Authorised Officer can under the Act XVII of 1970 *suo motu* revise his own order granting exemption and turn round to say that by mistake he had rendered judgment, and hence was revising his own order.

Held: In the instant case, it is not a clerical error on a *bona fide* mistake contemplated under section 15 of the Act that is sought to be revoked by the order under revision; the Authorised Officer who revised his own order resorted to a fresh assessment regarding the determination of exemption. This is certainly revising his own order which cannot be done under the provisions of the Act. If it was aggrieved, the provisions of section 78 of the Act ought to have been resorted to. There is absolutely no provision in the enactment justifying such a revision indulged by the Authorised Officer. [*Para.* 5.]

Cases referred to:—

Chellamma v. *The Authorised Officer, Land Reforms*, (1970) 2 M. L J. (N. R. C.) 4; *Syed Rabia Beevi* v. *The Authorised Officer*, (1970) 2 M. L. J. 730 : 83 L. W. 555.

Petition under section 26 of Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act to revise the order of the Sub-Court, (Land Reforms Tribunal), Chingleput, 2nd December, 1980 in C. M. A. No. 198 of 1978 etc.

B. Punyakodi Chetty and *V. Shanmugham*, for Petitioner

The Additional Government Pleader, for Respondent.

The Court delivered the following

JUDGMENT.—The only point that arises for consideration in this civil revision petition is whether the Authorised Officer can *suo motu* revise his own order, granting exemption and turning round to say that by *bona fide* mistake he had rendered judgment and thereby revise his own judgment.

2. It is common ground that the Authorised Officer in his order, dated 8th November, 1972 in P-8/TVR/MRI/70 D has observed as follows :

*C. R. P. No. 522 of 1981. 25*th March*, 1981.

> "The Special Deputy Tahsildar (Land Reforms) Kanchipuram who inspected the exempted lands has reported that an extent of 5. 2 6ordinary acres for which exemption was gr nted under section 73 (*viii*) for growing fuel trees has been cultivated with paddy, gingelly groundnut, etc, in violation of the conditions of exemption. Verification of the village accounts and enquiry of the village karnam have also confirmed the violation of the condition.
>
> The landowner was enquired in the matter during enquiry, the landowner has stated that the conditions of exemption were not violated as long as they were in his holdings and it was only after the lands were sold by him, the purchaser has violated the conditions. On verification of this office records, the orders dated 8th June, 1974, already granting exemption under section 73 (*viii*) are also found to be incorrect. I therefore include the exempted extent of 5.26 ordinary acres equivalent to 3.00 standard acres in the holdings of the land owner and declare an extent for 3.90 standard acres as surplus in the case."

The observations made above, according to the learned counsel for the revision petitioner is assuming jurisdiction which is not vested with the Authorised Officer because when once exemption had been granted under section 73 (*viii*) of the Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act XVII of 1970, and that was found to be incorrect by it by subsequent investigations, it is under appeal provided under section 8 of the Act the aggrieved Authorised Officer can agitate the matter and cannot *suo motu* include the exempted extent of 5. 26 ordinary acres equivalent to 3.00 standard acres in the holdings of the land owners and declare an extent of 2.90 standard acres as suplus in this case. The learned counsel for the revision petitioner in this regard refers to the decision in *Chellammal and another* v. *The Authorised Officer, Land Reforms Madurai and another*[1], as well as decision in *Syed Rabia Beevi* v. *The Authorised Officer*[2].

3. In *Chellammal and another* v. *The Authorised Officer, Land Reforms, Madurai and another*[1], one *R* died on 2nd August, 1961, possessed of 45 standard acres of land and leaving his widow and a married daughter. The Authorised Officer examined the question of ceiling and found as a result of the devolution by the law of succession of the property of the deceased to his widow and married daughter, each will get lands below the ceiling, that the case did not come under the purview of the Act. On the question whether the Authorised Officer could revive the proceedings of the administrative directions of the Board of Revenue, it was held by this Court that the Authorised Officer having made an order that the Act would not apply in the circumstances of the case, would have no jurisdiction vested in him to revise and continue the proceedings under the Act, that it would not be correct to say that the proceedings would be pending till the final publication under section 12 of the Act, that the proceedings under the Act are intended to find the excess and if the Officer passed an order that there was no excess that order would be final and that no provision is to be found in the Act to reopen such an order. By referring to the above short notes reported, the learned counsel for the revision petitioner submits that in the instant case, the very same attitude had been exhibited by the Authorised Officer which has been actually prohibited by the *ratio decidendi* of the above said decision rendered by this Court. In this regard, the decision in *Syed Rabia Beevi* v. *The Authorised Officer*[2], which arises out of section 15 of the Madras Land Reforms (Fixation of Ceiling on Land) Act LVIII of 1961, exhibits the following *ratio decidendi*

> "Section 15 having regard to the language employed, does not amount to the usual power of revision. The mistake that can be corrected under section 15 (*a*) is in regard to an entry in the final statement. It follows, therefore, that if the entry in the final statement is based upon the earlier decision after hearing the objections under sections 10 and 12, it is not contemplated that section 15 is to cover such a situation. What appears to be the scope of section 5

1. (1970) 2 M. L. J. (S. N.) 4.
2. (1970) 2 M. L. J. 700; 83 L. W. 555.

1. (1970) 2 M. L. J. (S. N.) 4.
2. (1976) 2 M. L. J. 700; 83 L. W. 555.

is that it applies to mistakes in the correctness not of the merits but of the form of entry in the final statement, just as section 15 (*b*) is directed against clerical or arithmetical mistake".

4. In the instant case, it is not the clerical error or the *bona fide* mistake contemplated under section 15 of the Act that is sought to be revoked by the order under revision; but the Authorised Officer who revised his own order resorted to a fresh assessment regarding the determination of the exemption. This is certainly revising its own order which cannot be done under the provisions of the Act. If it was aggrieved, certainly as pointed out by the learned counsel for the revision petitioner herein, the provisions of section 78 ought to have been resorted to. There is absolutely no provision in the enactment which justifies such a revision indulged in by the Authorised Officer. Thus the order under revision becomes revisable and is hereby revised. The revision petition is allowed with costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*P. R. Gokulakrishnan, O. CJ. and V. Ratnam, J.*

The Divisional Manager, Life Insurance Corporation of India, Madurai and others .... *Appellants**

v.

R. Sivasathyamurthi ... *Respondent.*

(A) *Life Insurance Corporation of India (Agents) Regulations (1972), regulation 16* (b), (d)—*Insurance Agent — Charge memo. issued —Investigation by the Corporation*—Ex parte *statements obtained from proposers— Enquiry into the charges by the Corporation*—Ex parte *statements relied on—Copies not given to agent —Services of agent terminated — Violation of principles of natural justice — Reasonable opportunities not given to agent to meet the allegations and the evidence against him— Order of termination quashed.*

(B) *Natural justice — Principles of— Applicability in disciplinary proceedings.*

The respondent was appointed as an Insurance Agent by the Life Insurance Corporation of India. He procured two proposals for insurance and he stated that the lives of the assured were medically examined by a particular medical practitioner. But the father of the assured wrote a letter to the Life Insurance Corporation of India that the respondent secured the proposals through misrepresentation and fraud. According to the father there was absolutely no medical examination of the assured who were then students and no medical certificates were obtained on the date stated by the respondent. On receipt of this letter, the Life Insurance Corporation of India called for an explanation from the respondent. To this letter, the respondent did not reply. The Corporation sent a reminder, to which the respondent sent a reply denying the allegations made in those letters. The service conditions of the respondent were governed by the Life Insurance of India (Agents) Regulation, 1972. Regulation 16 therein deals with termination of agency for certain lapses. It was in respect of lapses mentioned in Regulation 16 (*b*) and (*d*) that action was taken against the respondent after allegedly complying with the proviso to the Regulation 16. Not satisfied with the explanation of the respondent, the Corporation issued a show-cause notice to which the respondent replied denying the charges. Even though the respondent did not ask for a personal hearing in his reply, he had requested them to make a complete enquiry regarding the allegations levelled against him. The Corporation after calling for particulars from the Medical Officer alleged to have examined the insured through the college authorities passed orders terminating the agency of the respon-

*W. A. No. 517 of 1978. 30*th March*, 1982.

dent. The appeal preferred by him against the order was rejected and a further memorial to the Chairman was also rejected. The respondent thereupon filed a writ petition which was allowed, quashing the impugned order. On appeal.

Held:—Suspicion cannot be allowed to take the place of proof even in domestic inquiries. It is all the more so when actions are being taken in pursuance of statutory regulations for taking such disciplinary proceedings. Thus the reasonable opportunity to show cause against the termination conferred by the proviso to Regulation 16 definitely visualises the furnishing of various copies of the documents to the agent which had been taken behind his back. The particulars which were taken for the purpose of establishing the specific allegations against, the agent, were not definite but were vague. On the other hand the appellants herein had presumed certain things from such vague statements referred to above and passed the impugned order. In such a context the Supreme Court had held that it may, at best create a suspicion, but suspicion itself cannot take the place of proof. In this case on mere suspicion the agency of the respondent had been terminated. This was not justified. [*Para.* 10.]

Cases referred to :—

Fedee (P) Ltd. v. *S. N. Bilgrani*, 1960 S. C. J. 235 : (1960) 1 An. W. R. (S. C.) 71 : (1960) 1 M. L. J (S. C.) 71:(1960) M. L. J. (Crl.) 184 : (1960) 2 S. C. R. 408 : A. I. R. 1960 S. C. 415; *Union of India* v. *H. G. Goel*, (1964) 4 S. C. R. 718 : A. I. R. 1964 S. C. 364 ; *Nand Kishore* v. *State of Bihar*, (1978) 3 S. C. C. 366 : A. I. R. 1978 S. C. 1277.

Appeal under clause 15 of the Letters Patent against the order of V. Ramaswami, J., dated 18th August, 1976 in W. P. No. 4622 of 1976

R. Arunagirinathan for *Raj and Raj*, for Appellant.

M. N. Krishnamani, for Respondent.

The Order of the Court was made by

Gokulakrishnan, O.CJ.—This writ appeal is against the order passed in W. P. No. 4622 of 1976. The Divisional Manager, Life Insurance Corporation of India, Madurai, the Zonal Manager, Life Insurance Corporation of India, Madras and the Chairman, Life Insurance Corporation of India, Bombay have filed the writ appeal. The respondent by name R. Sivasathyamurthi, residing at Vikramasingapuram, Ambasamudram taluk, Tirunelveli Dt. was the petitioner in W. P. No. 4622 of 1976. He prayed for a writ of *certiorari* calling for the records of the first appellant in the order, dated 28th July, 1975, which was confirmed by the second and third appellants on 5th March, 1976 and 4th October, 1976, respectively and for quashing the same.

2. The short facts are as follows : The respondent herein was appointed as the Insurance agent in the year 1967. In 1974, he procured two proposals for insurance, each for a sum of Rs. 25,000, in respect of two individuals, M. Gopalakrishnan and M. Subramanian. The respondent has stated that the lives assured were medically examined by Dr. Sankaranarayanan on 23rd March, 1974. On 19th April, 1974, one Mahadeva Iyer, father of the said assured wrote a letter to the Life Insurance Corporation of India that the respondent secured the proposals on the basis of misrepresentation and fraud. According to the said Mahadeva Iyer there was absolutely no medical examination of the insured who were then students and no medical certificates were also obtained on the date stated by the respondent. On receipt of this letter, on 10th May, 1974, the Life Insurance Corporation of India, Tenkasi (Madurai) called for explanation from the respondent. To this letter, the respondent did not reply. Then to the reminder on 24th May, 1974, the respondent replied on 28th May, 1974, denying the allegations made in those letters. It is pertinent to note here that the service conditions of the respondent herein are governed by the Life Insurance Corporation of India (Agents) Regulations, 1972. Regulation 16 therein deals with termination of agency for certain lapses. It is in respect of lapses contained in Regulation 16 (*b*) and (*d*), action was taken against the respondent herein after complying with the proviso to Regulation 16. Since the Life Insurance Corporation of India was not satisfied with the explanation of the respondent, it issued a show cause notice on 17th December, 1974, to which the respondent replied denying the charge. Even though the respondent did not ask for personal hearing

·n his reply, dated 29th December, 1974, he has requested them to make complete enquiry regarding the allegations ·levelled against him. The first appellant after calling for particulars from the Medical Officer, who is alleged to have examined the insured and from the College authorities, passed orders on 28th July, 1975, terminating the agency of the respondent. The appeal preferred by the respondent to the second appellant was rejected on 5th March, 1976, and a further memorial to the Chairman, Life Insurance Corporation, the third appellant herein was also rejected by him on 4th October, 1976. In these circumstances, the respondent filed the writ petition as aforesaid challenging the legality of the order of termination passed on 28th July, 1975.

3. The learned single Judge of this Court after elaborately discussing the facts of the case observed that the Corporation seemed to have taken *ex parte* statements from the two proposers and Mahadeva Iyer and relied on the same without giving an opportunity to the respondent to disprove the allegations made against him, that the regulation required that the agent shall be given a reasonable opportunity to show cause against the termination, that would mean that the allegations against him should be directly put to him with the evidence in support of the same and he should be given enough opportunity to contradict such evidence, and that as the principles of natural justice have not been followed in this case he consequently allowed the writ petition by quashing the impugned order. It is as against this, the present writ appeal has been filed.

4. It is seen from the records that the respondent has promptly denied the charge that there was no medical examination of the assured by Dr. Sankaranarayanan on the date mentioned in the show cause notice, since at that time one of the assured was studying in Surakkal, South Canara, Karnataka State, and the other was studying in Agricultural College at Dhampur in Uttar Pradesh State. He has stated that when he took the assured, to Dr. Sankaranarayanan, the father of the assured Mahadeva Iyer represented to him that he had no money and requested him to postpone the proposal to March, 1974 and when Mahadeva Iyer approached him in March, 1974, for the proposal, the respondent got them examined by the same doctor in March, 1974, and made the proposal. He has categorically stated that when the assured were examined by the doctor on the relevent date, they were not in their respective colleges as alleged by Mahadeva Iyer and it is only Mahadeva Iyer who misrepresented the fact to get back the amount paid by him for the proposal. It is seen from the letter of the doctor dated 28th August, 1974, that the diary in which he has noted down the details of the examination of the assured was found to be missing and, when it is found, the doctor has promised to send the same. In the face of this reply by the doctor, it cannot be presumed that there was no examination of the assured by the doctor. Then, the records show that one of the colleges informed that Subramaniam was not in the college on 23rd March, 1974, and the other college in which Gopalakrishnan was studying did not send any reply to the letter sent by the Insurance Company. On the above materials, the first appellant has passed the impugned order which was confirmed by the second and the third appellants.

5. Mr. Arunagiri, learned counsel for the appellants, submits that sufficient opportunity has been given in the show cause notice itself and that the respondent has not asked for any personal enquiry in his reply statement. According to the learned counsel, the authorities of the Life Insurance Corporation after making necessary enquiries and gathering sufficient particulars, have correctly terminated the agency of the respondent as provided under Regulation 10 (*b*) and (*d*) of the Life Insurance Corporation of India (Agents) Regulations, 1972, and a reasonable opportunity to show cause against such termination was given to the respondent as per proviso to Regulation 16.

6. Regulation 16 (1) is as under—

> "The competent authority may, by order, determine the appointment of an agent."

Regulation 16 (1) (*b*) and (*d*) is as follows:

> (*b*) if he acts in a manner prejudicial to the interests of the Corporation or to the interests of its policy holders;

(*d*) if it is found that any averment contained in his agency application or in any report furnished by him as an agent in respect of any proposal is not true;"

The proviso to the above regulation reads as follows—

"Provided that the agent shall be given a reasonable opportunity to show cause against such termination."

It is, therefore, clear that the said proviso to the Regulation specifically states that reasonable opportunity to show cause against such termination has to be given.

7. Mr. Krishnamani, learned counsel for the respondent, states that the copy of the complaint by Mahadeva Iyer and the copies of the statements obtained from the sons of Mahadeva Iyer were not given to him by the immediate superior of the respondent which would afford him reasonable opportunity to explain away the complaints against him before the impugned order was passed.

8. Mr. Arunagiri, learned counsel for the appellants, submits that no doubt copies of these documents were not furnished but the contents of the same were made known to the respondent herein in the show cause notice itself. Such explanation in our view is far from satisfactory.

9. *Fedee (P) Ltd.* v *S. N. Bilgrami*[1], cited by the learned counsel for the appellants clearly brings out the standard of reasonableness in affording such opportunity. The Supreme Court at page 419 observes thus—

"There can be no invariable standard for 'reasonableness' in such matters except that the Court's conscience must be satisfied that the person against whom an action is proposed had a fair chance of convincing the authority who proposes to take action against him that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause against such proposed action, the nature of the plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and all other matters which help the mind in coming to a fair conclusion on the question".

In *Union of India* v. *H. G. Goel*[1], cited by the learned counsel for the respondent the Supreme Court has specifically held thus—

"It may be that the technical rules which govern criminal trials in Courts may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules".

In *Nand Kishore* v. *State of Bihar*[2], the Supreme Court had occasion to deal with the principles that have to be followed in disciplinary matters. The Supreme Court has held as follows—

"Before dealing with the contentions canvassed, we may remind ourselves of the principles in point, crystallised by judicial decisions. The first of these principles is that disciplinary proceedings before a domestic tribunal are of a quasi-judicial character. Therefore, the minimum requirement of the rules of natural justice is that the tribunal should arrive at its conclusion on the basis of some evidence *i. e.*, evidential material which with some degree of definiteness points to the guilt of the delinquent in respect of the charge against him. Suspicion cannot be allowed to take the place of proof even in domestic enquiries".

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1. 1960 S. C. J. 235 : (1960) 2 S. C R. 408 : (1960) 1 An. W. R (S.C.) 71 : (1960) 1 M. L. J. (S. C) 71 : (1960) M. L J. (Crl.) 184 : A. I. R. 1960 S. C. 415.

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1. (1964) 4 S. C. R. 718 : A I. R. 1964 S. C. 354.
2. (1978) 3 S. C. C. 366 : A. I. R. 1978 S. C. 1277.

10. Considering the abovesaid principles laid down by the Supreme Court, it is clear from the facts placed before us for the appellants that no conviction or action could be taken with such meagre materials. It has been held in the above decision that suspicion cannot be allowed to take the place of proof even in domestic enquiries. It is all the more so when actions are being taken in pursuance of the statutory regulations for taking such disciplinary proceedings. Thus, the reasonable opportunity to show cause against such termination contained in the proviso to Regulation 16 definitely visualises the furnishing of various copies of documents to the respondent which were taken behind the back of the respondent herein. Even apart from these statements, the particulars from the college authorities and the doctor concerned which were taken for the purpose of establishing the specific allegation against the respondent, are not definite but are vague. On the other hand, the appellants herein have presumed certain things from such vague statements referred to above and passed the impugned order. In this context the Supreme Court has held that it may, at best create a suspicion, but suspicion itself cannot take the place of proof and in this case on suspicion the agency of the respondent has been terminated.

11. Taking all these aspects into consideration the learned Judge of this Court has correctly held that the principles of natural justice have not been followed either by the first appellant initially or by the second and the third appellants subsequently. We are in complete agreement with the said findings of the learned single Judge of this Court.

12. In the circumstances, we are of opinion that the appeal has to be dismissed, as there are no materials or ground to interfere with the findings of the learned single Judge. However, we make it clear that it is open to the Life Insurance Corporation of India to start the enquiry, if it so desires, from the stage of the explanation given by the respondent and complete the same after giving the respondent sufficient opportunity to prove his case.

13. Accordingly, the writ appeal is dismissed but there will be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

P. Gokulakrishnan (Minor), represented by his father and guardian A. M. Pitchai Pillai ... *Petitioner**

v.

M/s. Asiatic Automobiles, No. 119, General Patters Road, Mount Road, Madras-2 ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a) *(iii)—Minor landlord of a building—Minor admitted to the benefits of a partnership—Minor filing petition under section 10 (3)* (a) *(iii) of Act XVIII of 1960 against the tenant seeking the building for partnership business—Eviction ordered by Rent Controller—Reversal of order by Appellate Authority—Revision by minor—Minor held incompetent to represent the partnership.*

A minor was the landlord of a building. The minor was admitted to the benefits of a partnership business. Thereafter the minor filed a petition for eviction against the tenant requiring the building for own occupation for non-residential purpose. The case, during the course of the evidence, was that the property of the minor was sought for purposes of the partnership business. The Rent Controller allowed the petition. However, on appeal by the tenant, the Appellate Authority reversed the order of eviction. The minor filed a revision to the High Court.

Held:—A petition cannot be maintained at the instance of a minor who has no legal capacity to represent the partnership. The petition for eviction of the tenant cannot be maintained at the instance of the partnership by the minor. [*Para.* 8.]

Cases referred to:—

M. AR. RM. P. M. Chidambaram Chettiar v. *National City Bank of New York*, (1936) 71

*C.R.P. No. 1486 of 1981. 24*th December*, 1981.

M. L. J. 373 : 44 L. W. 310 : A. I. R. 1936 Mad. 707 ; *Lovell* v. *Beauchamp*, (1894) A. C. 607 ; *Harris* v. *Beauchamp Brothers*, (1893) 2 Q.B. 534 ; *St. Gobnin Charny & Cirely Company* v. *Hayermann's Agency*, (1893) 2 Q. B. 96; *Mac Iver* v. *G. & J. Burns*, (1895) 2 Ch. 630.

Petition under section 25 of the Act XVIII of 1960 as am ended by Act XXIII of 1973 praying 1960 the High Court to revise the order of the II, Judge (Appellate, Authority), Court of Small Causes, Madras, dated 10th March, 1981 and made in H. R. A. No. 849 of 1980 against H. R. C. No. 3118 of 1979, IX Judge, Court of Small Causes, Madras.

The Advocate-General for *T. Thirumaran* and *D. Sankaran*, for Petitioner

P. M. Jummakhan, for Respondent.

The Court made the following

ORDER.—This revision has been preferred by the landlord under the following circumstances: He filed H. R. C. No. 3118 of 1979 seeking eviction of the respondent-tenant on the ground of *bona fide* requirement for own occupation for non-residential purposes, as contemplated under section 10 (3) (*a*) (*iii*) of the Tamil Nadu Act XVIII of 1960, hereinafter referred to as the Act.

2. In the petition it was averred as follows in paragraph 4:

"The petitioner further states that he is carrying on a business under the name and style of *Thillai Nataraja Industries* in a rented house at premises No. 6, Seeyalamman Koil Street, Chintadripet, Madras-2. The petitioner is not having a building of his own to carry on his own business. The rented building is not convenient to improve his business. Further, the owners of the rented building want the same for the purpose of demolition and reconstruction. The petitioner is not having any other house of his own to carry on the business in the City of Madras except the building under the occupation of the respondent."

3. It should be noted at this stage that the petitioner is a minor represented by his father as guardian. This important fact looms large, as will be seen below. The contention of the tenant *inter alia* was that the need was not *bona fide*. During the course of evidence it was brought out the a partnership deed, Exhibit P-12 was entered into on 6th May, 1978, and the petition for eviction itself came to be filed on 27th September, 1979. The case during the course of the evidence was the minor had been admitted into the partnership and the property belonging to the minor is sought for purposes of the partnership business.

4. The Rent Controller was of the view that the *bona fide* need had been made out and accordingly he ordered eviction.

5. On appeal, the Appellate Authority went into the question as to the definition of member of landlord's family as contained under section 2 (6-A) of the Act. According to him the requirement by a minor for the purpose of his father's business as a member of his family cannot fall within the scope of section 10 (3) (*a*) (*iii*) of the Act. Consequently he vacated the order of eviction and allowed the appeal. Thus, the revision.

6. The learned Advocate-General contends that where the partnership itself runs the business, of which the minor is a partner, certainly after the execution of Exhibit P-12, for purposes of the partnership business the premises could be sought. I put a straight question to the learned Advocate General whether the minor could represent the partnership? Because, it is well-settled, as seen from section 30 of the Partnership Act, that a minor by himself cannot be a partner, He can only be admitted to a partnership. Very fairly he cites before me the decision reported in *M. AR. RM. P. M Chidambaram Chettiar and others* v. *National City Bank of New York*[1], and invites my attention to the following passage at pages 708 and 709 :

"The first question is : Does the procedure prescribed by Order 30 in regard to suits against a firm in the firm name apply? In the first place, it is impossible to regard the minors as constituting a partnership firm. In the Partnership Act, 1932, 'partnership' is described as the relation

1. (1936) 71 M. L. J. 373 : 44 L. W. 310 : A.I.R. 1936 Mad. 707.

between persons who have agreed to share the profits of a business (S-4). The next section goes on to say that the relation of partnership arises from contract and not from status. It follows that a minor, who is incapable of contracting, cannot be a partner. Further, it is incomprehensible that four persons, who were all minors, can agree with each other to form a partnership. Then, turning to section 30 it enacts that a minor can never be a partner, although 'he may be admitted to the benefits of the partnership'. Under the section the adult partners, by a contract between themselves, can agree to confer this benefit upon a minor ; in other words, the relation of partnership is the result of contract and where any benefit is reserved to a minor, that arises not from a contract with the minor but between the adult partners. From this the necessary inference is, that there must be at least two adult partners who are capable of contracting before a minor is entitled to the benefits of partnership. The language of section 30 is perfectly clear and it expressly enacts that even where some benefit is reserved to a minor, he is not a partner, the only partners composing the firm being the adult members If therefore a suit is brought, under the procedure laid down in Order 30 against a partnership firm where a minor has been admitted to some kind of benefit, to such a suit the minor can in no sense be regarded as a party. Order 21, rule 50, Civil Procedure Code, provides that where a decree has been passed against a firm, execution may be granted against any property of the partnership; the reason for making the partnership property liable is not that the minor has been sued but that under the law the partnership property is liable for the debts of the firm. As Lord Horschell, L. C. observed in *Lovell* v. *Beauchamp*''.

"The adult partner is however entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership and that until these are provided for, no part of it shall be received by the infant partner."

1. (1894) A. C. 607.

7. In English law, there is nothing to prevent an infant becoming a partner, but even there it has been held in the case just cited, that when a suit is brought against a firm under Order 48 (*a*) corresponding to Order 30 of our Code, the judgment to be passed should be against the firm other than the minor partner; but that cannot affect execution against the partnership property : see also *Harris* v. *Beauchamp Brothers*[1]. For the position, that under the Indian law a decree, against a partnership firm, cannot be regarded as a decree against the minor who has been admitted to some benefit, it is unnecessary to rely upon the decision, already mentioned. of the House of Lords ; for section 30, Partnership Act places the matter beyond doubt. We may in this connection also mention that "under the Code, as under the English law, when a decree has been obtained against a firm in the firm name, execution may be levied against the partnership property, notwithstanding the fact that a minor possesses some interest. It is unnecessary to pursue this matter, as Mr. Rajah Iyer, the respondent's learned counsel, urges that the suit should be regarded as in effect having been brought under rule 10, of Order 30. The whole of the order is a reproduction, almost verbatim of the rules comprised in Order 48 (*a*) of the English Rules. Rule 10 of Order 30 is modelled on Order 48 (*a*), rule 11, the corresponding English provision. That rule applies, it has been held in England. to a single individual who carries on business under an assumed or trading name. (The Annual Practice (1936) p. 891; *St. Gobain Chauny & Cirey Company* v. *Hayermann's Agency*[2] and *Mac Iver* v. *G. & J. Burns*[3]). Rule 10 of Order 30 stands in marked contrast with rule 1. The latter rule applies to 'any two or more persons' whereas rule 10 refers to 'any person carrying on business'. There is no reason to depart from the view taken in the English cases and we must hold that rule 10 is applicable only to the case of a single individual. In this case, the so-called assumed name is said to be the name of the business owned by the four minors and the rule is, in our opinion, utterly inapplicable. It is further open to

1. (1893) 2 Q. B. 534.
2. (1893) 2 Q. B. 96.
3. (1895) 2 Ch. 630.

doubt whether the rule can apply to a minor at all, when what is alleged is, that the business is carried on his behalf by a guardian. The rule contemplates 'any person carrying on business' and as we have said, it is doubtful whether a minor alleged to be trading through his guardian answers this description.

8. The above extract clearly shows that a petition cannot be maintained at the instance of minor who has no legal capacity to represent the partnership. I should say, by and large it is the over-anxiety of the landlord which had brought woe upon him. The reason is, nothing prevented the parties to go on with the pleading as contended, as though the minor was doing the business. That was actually what was averred, to which I have made a reference earlier. But suddenly that case was given a go-by and Exhibit P-12 was introduced and evidence was adduced by the father appearing on behalf of the petitioner that the partnership needs the premises. That being so, the petition for eviction cannot be maintained at the instance of the parnership by a minor. Therefore, on this very simple ground, without going into the other contentions, the civil revisions, petition is dismissed. No costs.

9. The learned Advocate-General states that very soon the revision petitioner is likely to attain majority, in which event he should not be precluded by the dismissal of this civil revision petition. This will be so. As and when he attains majority and if he makes out a case of need of the partnership, then the matter will be decided on merits uninfluenced by the judgment in this civil revision petition.

10. As regards the other question, namely whether a valid renewal of Exhibit P-11 had taken place or not, that is a matter which has to be decided in separate proceedings. Any observation made herein is only for the purpose of rent control proceedings and that cannot be binding in other proceedings if and when they come to be taken. Therefore, to this extent the finding is vacated and the same can be traversed in separate proceedings.

S. J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

C. P. Gopinath ... *Petitioner**

v.

Mrs. Leela Govindan and another ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960,) as amended by Act (XXIII of 1973), section 11 (1)—Tenant filing application before appellate authority seeking extension of time for deposit of arrears—Dismissal of earlier application questioning direction to deposit of entire arrears by High Court not disclosed—Amounts to suppression of a material fact—Petitioner not entitled to any relief.

Against the petitioner an order of eviction was passed and aggrieved by that order he preferred an appeal to the Appellate Authority. He also filed an application for permitting him to deposit the arrears of rent. Time was given to deposit a sum of Rs. 16,600—the entire amount. That order was questioned by the tenant is a revision to the High Court and the same was dismissed *in limine*. Thereafter without bringing that fact to the notice of the Appellate Authority the tenant deposited a portion of the arrears and for deposit of the balance he obtained extension of time by a separate application. The balance of the amount was not deposited in full. The Appellate Authority passed an order under section 11 (4) of the Act and dismissed the appeal summarily. On revision against the dismissal order,

Held: This is a clear case of suppressing the vital fact which had enabled the petitioner to gain an indulgence before the Appellate Authority. The C. R. P. No. 1346 of 1981 was preferred against a direction of the Appellate Authority requiring the petitioner to deposit a sum of Rs. 16,600 on before 25th April, 1981. C. R. P. No. 1346 of 1981 was dismissed on 24th

*C. R. P. No. 2195 of 1981. *26th February,* 1982.

April, 1981, *in limine*. The result of the dismissal was that the order requiring the petitioner to deposit Rs. 16,600 on or before 25th April, 1981, had become final. Thereafter there was no scope for extension. [*Para.* 5.]

Petition under section 25 of Tamil Nadu (Buildings Lease and Rent Control) Act as amended by Act XXIII of 1973 to revise the order of the Appellate, Court (II Judge) Small Causes Court, Madras, dated 25th June, 1981 in M.P. No. 3239 of 1980 in HRA No 1506 of 1980 H. R. C. No. 641 of 1978 Rent Controller (IX Judge), Small Causes Court, Madras.

A. Subramanya Iyer and *Avudainathan*, for Petitioner.

V. Shanmugham and *Fiaz Alikhan*, for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition in which the entire blame has to be bourne only by the revision petitioner. At any rate, he has to be squarely blamed for not bringing a very vital matter to the notice of the Appellate Authority whose order is sought to be revised. Against the petitioner, an order of eviction was passed in H. R C. No. 641 of 1978 on 24th July, 1980, on the file of the Court of Small Causes, Madras. Aggrieved against that order of eviction, he preferred H. R. A. No. 1506 of the 1980. Under the terms of section 11 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), hereinafter referred to as the Act, it is incumbent upon him to deposit all arrears of rent due in respect of the building upto the date of payment or deposit. There is a further obligation to continue the payment of the depesit of any rent which might subsequently become due in respect of the building until the termination of proceedings before the Controller or Appellate Authority. The petitioner preferred M. P. No. 3239 of 1980 requiring him to deposit the arrears of rent which had accrued upto the date, namely, Rs. 16,600. Time was granted to deposit the entire amount on or before 25th April, 1981. That order was questioned in C. R. P. No. 1346 of 1981. This Court dismissed the revision *in limine*. This was on 24th April, 1981. Thereafter, without bringing that fact to the notice of the Appellate Authority, a sum of Rs. 5,000 was deposited on the next day, namely 25th April, 1981, and for deposit of the remaining amount of Rs. 11,600, time was extended in a separate application in M. P. No. 1079 of 1981 till 24th June, 1981. Therefore, it was ordered that the matter may, be called on 25th June, 1981 awaiting the deposit. On 25th June, 1981, the balance of Rs. 11,600 was not deposited in full, only a sum of Rs. 5,000 alone was deposited. At this junction, it is necessary for me to refer to the affidavit filed in support of the petition for extension of time (M. P. No. 1079 of 1981). That runs as follows:

"1. I am the appellant-petitioner herein.

2. I state that in M. P' No. 3239 of 1980. I was directed to pay a sum of Rs. 16,600 in this Honourable Court before 24th April, 1981, and I have made some arrangements for the same.

3. I state that suddenly my mother became seriously ill and I had to rush to my native place at Chavakad near Guruvayoor. My mother passed away on 11th April, 1981, and I had to incur heavy expenses in connection with my mother's demise:

4. I submit that as heavy stakes are involved I will be seriously prejudiced if extension of time for payment of Rs. 16,600 is not granted.

5. It is therefore, just and necessary that this Hon'ble Court be pleased to grant me two months time *i. e*, from 24th April, 1981 to 24th, June, 1981 to enable me to comply with the order of this Honourable Court to deposit the amouut of Rs. 16,600 and pass such further or other orders as this Honourable Court be pleased in the circumstances of the case."

2. It was under these circumstances the Appellate Authority thought fit to make an order under section 11 (4) of the Act and dismissed the appeal summarily. It is this which has led to the present revision.

3. In the meanwhile, certain developments which took place at the instance of the petitioner also require to be stated. He sought a stay of the order of eviction during the pendency of the revision and that stay application was dismissed. Thereupon, the matter was taken up to the Supreme Court. The petitioner was directed to deposit the entire arrears due and the present civil revision petition was directed by the Supreme Court to be disposed of on merits.

4. What is now contended before me is that, inasmuch as all the arrears upto date as required on the part of the petitioner have been deposited, the Rent Control appeal may be directed to be taken on file and be disposed of on merits. The respondent strenuously urges that once C. R. P. No. 1316 of 1981, had come to be dismissed the order had become final and thereafter there is no scope for extension of time. On 25th April, 1981, the position was, the petitioner had no other choice excepting to comply with the order of the deposit of Rs. 16,600, if he was really serious in prosecuting the appeal. But, strangely he deposited merely Rs. 5,000 and got time for another two months. Even then he would not comply with the order in full. Where, therefore, the extension itself on 25th April, 1981, was obtained only in the teeth of the order of the High Court, this is clearly a case of suppression of a material fact. Under these circumstances this Court will not interfere having regard to the conduct of the petitioner. It is no consolation to say that presently all arrears have been deposited.

5. On a careful consideration of the matter I am of the view that the contention urged on behalf of the respondent has great force. This is a clear case of suppressing a vital fact which had enabled the petitioner to gain an indulgence before the Appellate Authority. It has already been noted that C. R. P. No. 1346 of 1981 was preferred against a direction of the Appellate Authority requiring the petitioner to deposit a sum of Rs. 16,600 on or before 25th April, 1981. C. R. P. No. 1346 of 1981 was dismissed on 24th April, 1981, *in limine*. The result of dismissal was that the order requiring the petitioner to deposit Rs. 16,600 on or before 25th April, 1981, had become final. Thereafter, there was absolutely no scope for extension. Had only he brought it to the knowledge of the Appellate Authority on 25th April, 1981, that the revision was unsuccessfully preferred to this Court, I do not think the Appellate Authority would have been unwise enough to grant the extension. The very next day, as if nothing had happened, the petitioner goes before the Appellate Authority and deposits a sum of Rs. 5,000 and then an extension was granted till 24th June, 1981, requiring him to deposit the balance of Rs. 11,600. Even on that date the entire deposit was not made. An application was preferred requesting a grant of one more month's time. At least at that stage, the petitioner should have informed the Appellate Authority about the dismissal of the revision. Certainly, the Appellate Authority would have woken up and retraced the steps. Fortunately, in this case justice has been done even blindfolded by the Appellate Authority. He chose to reject the request of the petitioner to grant time beyond 25th June, 1981. That seems to be a blessing in disguise. Ultimately, justice has triumphed. Where, therefore, the above circumstances clearly indicate that there has been a material suppression of a vital factor by the petitioner, I am unable to see how petitioner's act could be condoned. As correctly contended by the learned counsel for the respondent, it is no consolation that the entire deposit had been made as on today pursuant to the direction of the Supreme Court. What the petitioner has done is the minimal statutory requirement as laid down under section 11 (1) of the Act, which is extracted below :

"Payment of deposit or rent during the pendency or proceeding for eviction. (1) No tenant against whom an application for eviction has been made by a landlord under section 10 shall be entitled to contest an application before the Controller under that section or to prefer any appeal under section 23 against any order made by the Controller on the application unless he has paid or pays to the landlord or deposits with the Controller or the Appellate Authority, as the case may be, all arrears of rent due in respect of the building upto the date of payment or deposit, and continues

to pay or to deposit any rent which may subsequently become due in respect of the building until termination of the proceedings before the Controller or the Appellate Authority as the case, may be".

6. But for this deposit it would not be possible for him to contest the appeal at all. Therefore, I do not think, the petitioner could gain any sympathy on this ground. For all these reasons, I have not the slightest hesitation in dismissing the revision. I am inclined to award costs against the petitioner, because of his failure to bring to the notice of the Appellate Authority the very vital fact, namely, the dismissal or C. R. P. No. 1346 of 1981, which, as observed above, would have changed the entire history of this litigation.

7. In the result, the civil revision petition is dismissed with costs.

R. S. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Ramaswami and T. N. Singaravelu JJ.*

Ramasayee Agro Industries Limited ... *Appellant**

v.

The India Sugars Refineries Ltd. ... *Respondent.*

(A) *Letters Patent (Madras), clause 15—"Judgment" meaning of.*

(B) *Civil Procedure Code (V of 1908), Order 16, rule 19—Scope and applicability—Witness residing at Bombay—Application for issue of sub-poena to give evidence—Rejection of application on the ground that Order 16, rule 10, Civil Procedure Code, was not applicable—Appeal against order—Competency—Appeal held maintainable.*

(C) *Company Court Rules, rule 9.*

An appeal was preferred against the rejection of an application filed under Order 16, rule 19 of the Code of Civil Procedure read with section 9 of the Company Court Rules, for issue of a subpoena to a witness residing at Bombay directing him to attend and give evidence in a company petition in which the appellant was respondent. The application was dismissed on the ground that Order 16, rule 19 is not applicable to a case where the witness resides beyond the distance of 500 kilometres and hence the Court cannot issue any order directing the witness to give evidence and the applicant must make his own arrangement to secure the evidence of that witness. A preliminary objection was raised against the maintainability of the present appeal on the ground that an order refusing to issue subpoena to a person to attend and give evidence was not a "judgment" within clause 15 of the Letters Patent.

Held: Overruling the preliminary objection, that the appeal was maintainable. It is not as if in every case an order refusing to summon a witness could not be treated as a judgment. where the refusal works serious injustice to the party concerned the order could be treated as a 'judgment' appealable under clause 15 of the Letters Patent. [*Para.* 6.]

In the instant, case, the order could not but be treated as a judgment since the order would amount to a denial of the right to defend the case itself and would cause serious injustice to the party concerned. This is not a case where the learned Judge, though accepting his jurisdiction to issue a summons, refuses to issue the same on the ground that either the witness is unnecessary or that the application was intended to drag on or delay the proceedings for any justifiable reason. Such type of orders may be regarded as discretionary orders in the course of the suit and cannot be treated as judgment. The present case is of a different kind. [*Para.* 7.]

The proviso to Order 6, rule 19, Civil Procedure Code, deals with a case where the witness resides beyond a distance of 500 kilometres. The proviso talks of two places mentioned in rule 19 (*b*). The two places are the place where the witness resides and the place where the Court is situate. Therefore when the proviso speeks of payment of air fare and calling the witness,

*O. S. A. No. 178 of 1981 *15th February*, 1982.

it relates to a case where clause (*a*) or clause (*b*) of rule 19 is not applicable. [*Para* 3.]

Since the order is one by which the learned Judge had felt that there was no jurisdiction vested in the Court to issue subpoena, it causes great prejudice to the party and an appeal against such an order is maintainable. [*Para.* 8.]

Cases referred to:—

Nurul Huda v. *Amir Hasen*, 76 Cal. W. N. 1039: A. I. R. 1972 Cal. 449; *Dhan Bai* v. *Babli Bai*, : A. I. R. 1934 Bom. 168 ; *Shah Babulal Khimji* v. *Jayaben D. Kanja*, (1981) 4 S. C. C. 8 : (1982) 1 S. C. J. 70 : A. I. R. 1981 S. C. 1786 ; *Shanti Kumar R. Canji* v. *Home Insurance Co. of New York*, (1975) 1 S. C. J. 187 : (1975) 1 S. C. R. 550 : (1974) 2 S. C. C. 387 : A. I. R. 1974 S. C. 1719.

P. B. Krishnamurthy and *R. Subramaniam*, for Appellant.

A. S. Kailasam, for Respondent

The Judgment of the Court was delivered by

Ramaswami, J.—This is an appeal against the rejection of an application filed under Order 16, rule 19 of the Code of Civil Procedure read with section 9 of the Company Court Rules, for the issue of a subpoena to a witness residing at Bombay, directing him to attend and give evidence in a company petition in which the appellant is the respondent.

2. The learned Judge dismissed the application on the ground that Order 16, rule 10 is not applicable to a case where the witness resides beyond a distance of 500 kilometres, and since Bombay is beyond 500 kilometres the Court cannot issue any order directing the witness to attend in person to give evidence and that the applicant must make his own arrangements to secure the evidence of that witness.

3. Order 16, rule 19, Civil Procedure Code, reads as follows :

"19. No one shall be ordered to attend in person to give evidence unless he resides—

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometres distance from the Court house:

Provided that where transport by air is available between two places mentioned in this rule and witness is paid the fare by air, he may be ordered to attend in person.

The learned Judge was of the view that rule 19 (*a*) prescribes a distance limit for issue of orders to witnesses to attend in person to give evidence and that the proviso makes no relaxation to the above prescription. We are unable to share this view. Rule 19 (*a*) deals with cases where the person to be called as a witness resides within the local limits of the Court's ordinary original jurisdiction, and rule 19 (*b*) deals with cases where he is residing outside the Court's ordinary original jurisdiction. In cases where he resides outside the jurisdiction the Rule provides (*a*) if he is at a place less than 100 kilometres or (*b*) if he is residing in a place less than 500 kilometres but there is a railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate the Court can issue a summons calling upon him to attend in person and give evidence in the suit or proceeding. The proviso should, therefore, deal with a case where the witness resides beyond the distanee of 500 kilometres. The proviso talks of two places mentioned in the rule. The two places mentioned in rule 19 (*b*) are the place where the witness resides and the place where the Court is situate. Therefore when the proviso speaks of payment of a fare and calling the witness, we are of the view that it relates to a case where clause (*a*) or clause (*b*) of rule 19 is not applicable. It is true that it is plausible to argue that whereas in the case of a person residing beyond the local limits of the Court but within 500 kilometres, there is a discretion vested in the Court to call the witness under clause (*b*), if the applicant is willing to pay the air fare of that witness, no discretion is vested in

the Court and the words "he may be ordered to attend in person" occurring in the proviso should be read as shall be ordered to attend in person". But we think that the more reasonable and just way of reading the provision is that the proviso is applicable to a case where the witness is residing at a place beyond a distance of 500 kilometres. We are, therefore, unable to agree with our learned brother that the proviso makes no relaxation to the distance rule provided under clause (*b*) of rule 19.

4. Since the learned Judge did not go into the merits of the application as to whether he would or would not issue the subpoena, we think it desirable to remand the matter for fresh disposal.

5. The learned counsel for the respondent contended that an order refusing to issue a subpoena to a person to attend in person to give evidence is not a judgment within the clause 15 of the Letters Patent and, therefore, no appeal is maintainable and this appeal is accordingly liable to be dismissed as not maintainable. In this connection he referred to a certain passage in Mulla on the Code of Civil Procedure. Vol. I, 13th Edn., at page 876, wherein the learned author has observed:

> "Where a party applies for summonses to witnesses, but the application is refused, he cannot appeal from the order of refusal. He must wait until the suit is disposed of, and if the decree in the suit goes against him, he may appeal from the decree and set forth the refusal of the lower Court to issue summonses as a ground of objection in the memorandum of appeal."

He also cited a decision of the Full Bench of the Calcutta High Court in *Nurul Huda and others* v. *Amir Hasen and another*[1], where an order setting aside an abatement was considered as not a judgment, and a decision of the Bombay High Court reported in *Dhan Bai* v. *Babli Bai*[2], where an order refusing commission to examine a witness was considered to be not appealable under clause 15 of the Letters Patent.

6. It is not necessary for us to consider all these cases as the Supreme Court had occasion to consider the meaning of judgment in clause 15 of Letters Patent, in an elaborate judgment. After a consideration of the judgments of all the High Courts, the Supreme Court in the decision reported in *Shah Babulal Khimji* v. *Jayaben D. Kania and another*[1], has set out certain principles and we had to apply the same to this case. While giving illustrative cases of interlocutory judgments, the Supreme Court observed :

> "In the course of the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, *e. g.*, an order refusing an adjournment, an order refusing to summon an additional witness or document, an order refusing to condone delay in filing documents after the first date of hearing, an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.
>
> Thus, in other words every interlocutory order cannot be regrarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned Similarly orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate Court in appeal against the final judgment.

We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet

1. 76 C. W. N. 1039 : A. I. R. 1972 Cal. 449 (F. B.).
2. A. I. R. 1934 Bom. 168.

1. (1981) 4 S. C. C. 8 : A. I. R. 1981 S. C. 1786 : (1982) 1 S. C. J. 70.

amount to a judgment within the meaning of the Letters Patent. Suppose the trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases although the order passed by the trial Judge is purely discretionary and interlocutory, it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the Letters Patent. This is what was held by this Court in *Shanti Kumar's case*[1] as discussed above.

Let us take another instance of a similar order which may not amount to a judgment. Suppose, the trial Judge allows the plaintiff to amend the plaint adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by the plaintiff at the trial. In such cases the order of the trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore be not a judgment with in the meaning of clause 15 of the Letters Patent."

Though there is a reference in the first paragraph of tne judgment extracted above to an order refusal to summon an additional witness it is not a general statement that in every case of refsaul to summon a witness the order could not be treated as a judgment. In fact, the other paragraphs show that it, by reason of such refusal, it works serious injustice to the party concerned, that could be treated as a judgment appealable under clause 15. One of the principles, as we understand from the judgment in this case is, if the order causes gross or serious injustice to the party concerned, an appeal would lie.

7. In the instant case, we may also point out, the learned Judge held that he had no jurisdiction to issue a subpoena in a case where the witness resides beyond 500 kilometres from the local limits of the Court and that the proviso to Order 6, rule 19, Civil Procedure Code, does not enable him to issue a subpoena. To such a case we consider that the order could not but be treated as a judgment, since that would amount to a denial of a right to defend the case itself and would cause serious injustice to the party concerned. We are not concerned with a case where the learned Judge, though accepted his jurisdiction to issue summons, but, in exercise of his discretion, refused to issue the same on the ground that either the witness is unnecessary or the application itself was intended to drag on or delay the proceedings or for any justifiable reason. Such type of orders may be treated as discretionary orders in the course of a suit which may, though cause some inconvenience or to some extent prejudice to one party or other, cannot be treated as a judgment, as observed by the Supreme Court in paragraph 119 of its judgment. But that is not the case with which we are concerned here.

8. Since the order is one by which the learned Judge felt there was no jurisdiction vested in the Court to issue a subpoena, we consider that it causes great prejudice to the party and an appeal against such an order is maintainable.

9. In the result, the appeal is allowed, and for the foregoing reasons it is remanded to the learned trial Judge for fresh disposal on merits. There will be no order as to costs.

R. S. — *Appeal allowed.*

1. (1974) 2 S. C. C. 387 : (1975) 1 S. C. J. 187: (1975) 1 S. C. R. 550 : A.I.R. 1974 S. C. 1719.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkanu, J.*

C. Munuswamy ... *Petitioner.**

v.

Sri Sarada College Educational Trust, represented by its Correspondent, Yathiswari. Sarada College, Salem ... *Respondent.*

Tamil Nadu Debt Relief Act (XXXI of 1976), section 12 and Tamil Nadu Debt Relief Act (V of 1980)—Debtor claiming benefit under the Act—Burden of proof.

With respect to burden of proof there is no specific provision in the enactment itself relating to burden of proof, because it is only the letter and spirit of the provisions of the enactment regarding the burden of proof that has to be given effect; but in the absence of the same it is only a matter of discretion and of course, that discretion must be judicial discretion pure and simple and nothing else. [*Para.* 8.]

Cases referred to:—

M/s. Muthukumara Pillai Son v. *T. N. V. Nilakantha Chettiar*, (1977) T. L. N. J. 404 ; *Arumuga Nadar* v. *Kumara Pillai*, (1981) 94 L. W. 278 : (1981) T. L. N J. 8 ; *Chidambara Chettiar Firm* v. *State of Tamil Nadu*, (1977) 2 M. L. J. 1 : 90 L. W. 27 : I. L. R. (1977) 1 Mad. 135 : A. I. R. 1977 Mad. 153 ; *Jagannatha Chettiar* v. *Padma Financial Corporation*, (1978) T. L. N. J. 8.

Petition under section 115 of Act V of 1908 to revise the order of the Sub-Court, Salem, dated 28th November, 1980 in R. E P. No. 485 of 1979 in O. S. No. 115 of 1975.

R. Sundaralingam, for Petitioner.

S. Jagadeesan, for Respondent.

The Court made the following

ORDER —The interesting point that confronts this Court in this civil revision petition is whether the burden of proof lies on the person who seeks the benefits under the agrarian Act which contained itself agrarian reforms or on the person who raised a contention that the petitioner who seeks the benefits is not entitled to the said benefits of the agrarian enactments that had emanated from the floor of the State Legislature as a reform giving certain benefits to the indebted agriculturist and agricultural labourer and small farmer in the State. In this regard, it is relevant to note that Act XXXI of 1976 (Tamil Nadu Debt Relief Act, 1976), contained a provision under section 12 regarding the burden of proof which was omitted by Tamil Nadu Act V of 1980. Therefore, it has become obligatory on the part of this Court now to observe about the burden of proof in a case where the respondent C. Munuswami claims benefit under Tamil Nadu Act XXXI of 1976 in his counter that he had filed with reference to R. E. P. No. 485 of 1979 in O. S. No. 115 of 1975, and subsequently filing another counter claiming benefits under the Tamil Nadu Act XIII of 1980. The lower Court while passing an order on 28th November. 1980 in this matter, *viz.*, R. E. P. No. 485 of 1979 in O. S. No. 115 of 1975. On the file of the Principal Subordinate Judge, Salem, had observed that the respondent in R. E. P. No. 485 of 1979. *viz*, C. Munuswami cannot seek the benefit under either of these two enactments, and therefore, he has elected to claim the benefits only under Tamil Nadu Act XIII of 1980 by leading some evidence on this aspect and as such the entire evidence available on record so ar as the appellant is concerned in this petition has to be looked into in that angle *viz.* whether C. Munuswami, the respondent in R. E. P. No. 485 of 1979 is entitled to the benefits under the provisions of Tamil Nadu Act XIII of 1980 or not.

2. The petitioner Sri Sarada College Educational Trust represented by its Correspondent Yathiswari, Sarada College had let in evidence through its Correspondent's Personal Assistant, P. W. 1 B. Viswanathan, stating that the respondent, Munuswami, herein has been working as a building contractor and as a matter of fact he had been getting only an annual income of more than what is contemplated as the minimum under the provisions of the Act XIII of 1980 and as such the respondent Munuswami is not entitled to the benefits of the provisions of the Tamil Nadu Act XIII of 1980. He had been vehemently cross-

*C. R. P. No 43 of 1981. 22nd *December*, 1981.

examined on behalf of the respondent Munuswami. R. W. 2, Ramaswami was examined and as a matter of fact the respondent Munuswami himself has got into the box as R W. 1 and stated that he is getting an income which is less than the limit prescribed under provisions of Act XIII of 1980 *viz.*, below Rs. 4,800 and as such he is entitled to the benefits of the provisions of the enactment.

3. It is relevant in this connection to note 'debtor' has been defined under Act XIII of 1980, under section 3 (*d*) as any person from whom any debt is due and whose annual household income exceeded, Rs. 4,000. There is no documentary evidence at all adduced in this case and the entire case rests on oral evidence available on record as mentioned above.

4. The point for consideration in this civil revision petition is by coming to the conclusion that the respondent Munuswami is not entitled to the benefits of Tamil Nadu Act XIII of 1980 whether the lower Court had committed any illegality or irregularity or exercised the jurisdiction which is not vested or exceeded its jurisdiction.

5. When the entire case is looked from the above angle, it is seen that P. W. 1, B Viswanathan. Personal Assistant of the Correspondent of Sarada College, has deposed that he is the personal assistant of the petitioner who has filed this petition under Order 21, rule 11, Civil Procedure Code, for proclaiming and selling the property in question. In fact the order under revision has declared that the petitioner College is entitled to proclaim and sell the property in question. The petition under Order 21, rules 64 and 66 of the Civil Procedure Code, was filed by the petitioner with the allegation that the house in question exclusively belongs to the respondent revision-petitioner herein. The decree amount was Rs. 13,556.56 and interest on Rs. 13,144.93 at 9 per cent. from 27th February, 1975 to 10th August, 1979 had worked itself out to the tune of Rs. 1,500 totalling in all Rs. 17,056.56 and the cost was Rs. 1443.20. So the proceedings were taken by the decree-holder against the property of the judgment-debtor.

6. It is specifically stated by P. W. 1 Viswanathan personal assistant of the Correspondent of Sarada College Educational Trust that the house in question has been let out to a tenant so far as the upstairs portion is concerned and towards rent of the said portion of the house belonging to the judgment-debtor, a sum of Rs. 150 was being received by the respondent per month. According to P. W. 1 the house is worth Rs. 30,000 to Rs. 40,000. Nothing material has been elited in the cross-examination of P. W. 1 which will entitle the judgment-debtor revision-petitioner herein to uphold his contention that he is entitled to the benefits of the provisions of Act XIII of 1980. The self-interested testimony emanating from the revision petitioner herein as R. W. 1 cannot be given much weight as well as the evidence of R. W. 2 also in that his evidence discloses that he is interested in R. W. 1. Therefore, in coming to the conclusion that the revision petitioner is not entitled to the benefits of the provisions of Act XIII of 1980, this Court holds that the lower Court had not committed any error—much less illegality or irregularity or error regarding jurisdiction.

7. It is also relevant in this connection to refer in this judgment with reference to the case law on the subject by both the learned counsel for the petitioner, Mr. Sundaralingam, and Mr. Jagadeesan, learned counsel for the respondent have been of a much enlightening bearing and it is but necessary that these decisions should also form part of this Order. Mr. Sundaralingam referred to the decision in *Messrs. Muthukumara Pillai Son* v. *T. N. V. Nilakantha Chettiar*[1], wherein it was held that the burden of proof under section 3 of the Tamil Nadu Agriculturists Relief Act is on the plaintiff that he has to prove that the defendents are assessed to income-tax and thereby deprive them of the benefits comtemplated under the said enactment. Mr. Sundaralingam also refers to the decision in *Arumuga Nadar* v. *Kumara Pillai, represented by A. Rajagopal, Advocate*[2], for the proposition that so far as section 3 (2) of the Act IV of 1978 is concerned the aspect regarding the agricultural, agrarian or otherwise and the burden of proving the said aspect, is on the debtor.

8. On the other hand, Mr. Jagadeesan, the learned counsel for the respondent refers to

1. (1977) T. L. N. J. 404.
2. (1981) T. L. N. J. 8: (1981) 94 L. W. 278.

the aspect that section 12 dealing with burden of proof in the Tamil Nadu Act had been deleted by the provision of Act V of 1980 which will enable us to understand that the burden of proof depends on each and every case as the facts of legal evidence exhibit themselves in a proceeding. He also refers to the decision in *Chidambara Chettiar firm* v. *State of Tamil Nadu*[1], for the observation which runs as follows:—

> "In conclusion Mr. Venugopal pleaded that some of the terms of the enactment are most unreasonable and ruinous of the entire profession of money-lending and pawn-broking. Our attention was drawn particularly to section 4 (3) which requires a creditor to redeem the property from the possession of the transferee and produce it for being handed over to the debtor. After redemption the creditor is bound to return it to the debtor. He also referred to section 12, which provides that the burden of proving that the debtor is not entitled to the protection of the Act lies on the creditor. It was submitted that the burden of proving that a person is entitled to some exemption from the operation of the Act is on the person who pleads exemption. It is virtually impossible for the creditor to prove that the debtor does not come within the exemption as the facts will be within the knowledge of the debtor and will not be available to the creditor. Those two provisions may make the position of the creditor difficult and from the point of view of money-lenders and pawn-brokers unreasonable. But that would not make the legislation invalid.
>
> If the petitioners want relief from the harsh provisions they will have to approach the Legislature and not the Court. Taking the interest of the community as a whole, there can be no doubt that the impugned legislation is a beneficial one."

He subm tted that in view of the above observations by the Court the provision under section 12 of the Act XXXI of 1970 was deleted by Tamil Nadu Act V of 1980. Mr. Jagadeesan also refers to the decision in *Jagannatha Chettiar* v. *Padma Financial Corporation*[1], for the proposition that the person claiming protection under the Act need not prove that he is entitled to the benefits of the Tamil Nadu Indebted Persons (Temporary Relief) Act, 1976 and that the burden was on the plaintiff to prove that he was not entitled to the protection but yet by referring to this decision he would be dislodged to contend that each and every case has to be found with proper perspective in relation to the burden of proof and it cannot be as if that the burden of proof is only on a particular side whether it is on the side of the plaintiff or the defendant or the petitioner or the respondent or the claimant or the objector or the person who is being represented by the Government or by the quasi-Government organisation and he would further submit that the entire discretion of shifting the evidence as to the actual appreciation regarding the point at issue lies on the Court and it is the Court which has to come to a conclusion regarding the conferring of the benefits under the provisions of the specialenactment and especially the omission of section 12 in the Tamil Nadu Debt Relief Act, 1976 by the Tamil Nadu Act V of 1980 on the basis of the observations of the Court itself would reveal that the legal approach is one which has to be guided by the judicial discretion and not by the letter of the law as it is so far as the burden of proof is concerned. I am unable to reject the abovesaid contention raised on behalf of the respondent by Mr. Jagadeesan as wholly unsustainable. The observation that has been made with respect to the burden of proof is applicable to this case in which there is no specific provision provided in the very enactment itself relating to burden of proof, because it is only the letter and spirit. of the provisions of an enactment regarding the burden of proof that has to be given effect, but in the absence of the same it is only the discretion and of course, that discretion must be pure and simple a judicial discretion and nothing else. On a careful consi-

1. (1977) 2 M. L. J. 1 : I. L. R. (1977) 1 Mad. 135 : 90 L. W. 27 : A. I. R. 1977 Mad. 153.

1. (1978) T. L. N. J. 8.

deration of the respective contentions it is sufficient at this stage to state that this Court need not interfere with the order under revision and as such it becomes one which is not subject to the revisional jurisdiction of this Court and as such the civil revision petition is liable to be dismissed but under the circumstances there is no order as to costs.

R. S. —— *Revision petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Natarajan, S. Padmanabhan and S. Nainar Sundaram, JJ.*

M/s. Southern Synthetics Ltd., Madras ... *Petitioner**

v.

State of Tamil Nadu, rep. by its Special Secretary to Government, Prohibition and Excise Department, Madras-9 and others ... *Respondents.*

Constitution of India (1950), Seventh Schedule, List II, Entry 8; List I, Entry 52—Methyl Alcohol though poisonous still consumed mistakenly as an intoxicant—State Government has power to legislate under Entry 8 of List II—Licences as to inflammable things to be obtained under the Inflammable Substances Act and the Petroleum Act (both Central Acts)—Power of State Government to exercise control under the Prohibition Act not obliterated—Methyl Alcohol industry notified under the Industries (Development and Regulation) Act as falling under Entry 52 of List I — Does not deprive State of its powers under List II—Levy of licence fee by State Government at slab rates for grant of DL 2 licences held Justified—Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules (1959), rule 8.

Held: Maybe, the use of methyl alcohol as an intoxicant would amount to an abuse of the product; but that will not detract from the position of its being used as an intoxicant, Since the policy of the Government under the Prohibition Act is to regulate the consumption of liquor in such a manner as will eventually fulfil the objective of Article 47 of the Constitution of India it must be held that the State is entitled to exercise its powers under Entry 8 of List II of the Seventh Schedule to the Constitution not only in respect of ethyl alcohol and preparations made therefrom, but also in regard to methyl alcohol, as the latter also is sought after and consumed, though mistakenly as an intoxicant. [*Para.* 14.]

Merely because methyl alcohol, on account of its high inflammability also calls for regulation under the Inflammable Substances Act and the Petroleum Act, it cannot be contended that the power of the State Government under the Prohibition Act to exercise control over methyl alcohol as an intoxicant will stand obliterated in full manner. [*Para.* 15.]

Once it is held that methyl alcohol can be treated as an intoxicating liquor and that the State is fully entitled, in exercise of its powers under Entry 8, List II (of the Seventh Schedule) to regulate its possession, storage, transport etc., then merely by reason of methyl alcohol industry being notified under the Industries (Development and Regulation) Act, as falling under Entry 52, of List I, the State will not stand deprived of its powers under List II. By exercise of its powers under the Madras Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules (1959), the right of anyone to manufacture methyl alcohol or to make use of methyl alcohol for manufacturing formaldehyde is regulated by the State. All that the State wants to achieve by means of the licensing system and payment of licence fees and security deposit, is the prevention of the use of methyl alcohol as an intoxicant. The control envisaged is therefore, clearly one of a marginal or peripheral nature, and does not go to the heart of the matter. [*Para* 22.]

It cannot he denied that the State has to maintain a separate machinery, irrespective of the number of applicants, for grant of D. L. 2 licences and for ensuring that the licence conditions are fully observed. It is equally axiomatic that the greater the quantity of spirit that is required by a licensee, the greater in the need for scruti ny

*W. P. No. 594 of 1976 and W. A. No. 8 of 1980' *11th September*, 1981

and inspection of the licensed commodity. If this is borne in mind, the attack on levy of licence fee on the basis of slab rates cannot be sustained. [*Para.* 31.]

Cases referred to:—

State of Andhra Pradesh v. *Formalin and Fine Chemicals Ltd.*, (1978) Tax. L. R. 1603 ; *State of Uttar Pradesh* v. *Synthetics and Chemicals Ltd.*, (1980) 2 S C. C. 441 : (1980) 2 S. C. R. 531 : (1980) Tax. L. R. 2294 : A. I. R. 1980 S. C. 614 ; *Bombay Oil Industries (P) Ltd* v. *Excise Inspector, Excise Range*, I. L. R. (1979) 2 Ker. 199 : 1983 Tax L. R. 2258 ; *Tika Ramji* v. *State of Uttar Pradesh*, 1956 S. C. J. 625 : 1956 S. C. R. 393 : A. I. R. 1956 S. C. 676 ; *K. D. H. P. Company* v. *State of Kerala*, (1972) K. L. T. 377 : A. I. R. 1972 S. C. 2301; *Ganga Sugar Corporation* v *State of Uttar Pradesh*, (1980) 45 S. T. C. 36 : (1980) 1 S. C. C. 223 : (1980) 1 S. C. R. 769 : A. I. R. 1980 S. C. 286 ; *Indian Mica and Macanites Industries Ltd.* v. *State of Bihar*, (1973) B. L J. R. 502 : (1971) (Supp.) S. C. R: 319 : A. I. R. 1971 S C. 1182 ; *Kewal Krishna* v *State of Punjab*, (1979) 3 S. C. R. 1217: (1980) 1 S. C. C. 416 : A. I. R. 1980 S. C. 1008 ; *Har Shankar* v. *Dy. E. and T. Commr.*, (1975) 1 S. C. C. 737 : (1975) Tax L. R. 1569 : A. I. R. 1975 S. C. 1121 ; *Maschemeijer Aromatics (India) Pvt. Ltd.* v. *State of Tamil Nadu*, I. L. R. (1980) 2 Mad. 113.

Petition under Article 226 of the Constitution of India for issue of a writ of *mandamus* directing the respondents to forbear from enforcing the provisions of Madras Denatured Spirit Methyl Alcohol and Varnish French Polish Rules of 1959 in so far as levying and collecting licence fee and/or gallonage fee or otherwise requiring the petitioner to furnish security in respect of methonol purchased, stored and used by the petitioner either from producers in the State or imported into the or State or from producing outside the State etc., etc.

V. K. Thiru venkatachari for *T. Raghavan*, *T. K. Seshadri* and *A. K. Mylswami*, for Petitioners.

K. Venkataswami, Advocate-General in-charge and *U. N. R. Rao, E. S. Govindan* and *Natarajan*, for *King and Patridge*, for Respondents.

The Judgment of the Court was delivered by

Natarajan, J.—The writ petition and the writ appeal arising from an order passed in an interlocutory petition (W. M. P. No. 5832 of 1979) in the writ petition before us, have been posted before a Full Bench on account of certain conflicting decisions on the question whether methyl alcohol is an intoxicating liquor coming within the scope of Entry 8 of List II of the Seventh Schedule to the Constitution of India, and whether a State Legislature has competence to legislate with reference to the possession, transport and storage of methyl alcohol and the issue of licences and imposition of licence fees. In the writ petition, the Constitutional validity of the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959 (hereinafter referred to as the Madras Spirit Rules) is questioned in so far as the Rules provide for the levy and collection of licence fee and/or gallonage fee. The writ appeal is directed against the order of V. Ramaswami, J. dismissing the petition. W. M. P. No. 5832 of 1979 for impleading respondents 2 to 4 as parties to the petition on the ground of judicial expediency.

2. In the writ petition, the Union of India has been impleaded as the second respondent pursuant to an application filed by the petitioner.

3. The petitioner company has been granted an industrial licence for establishing an industrial undertaking at Ranipet for manufacture of 6000 tonnes of formaldehyde and other organic chemicals. Methyl alcohol or methanol is the main raw material required for the manufacture of formaldehyde. The petitioner's factory would require annually 3000 metric tons equivalent to 37.50 lakhs liters by volume of methyl alcohol for the production of 6000 tonnes of formaldehyde. The Government of Tamil Nadu, in exercise of the powers conferred on it by the provisions of the Madras Probihition Act (X of 1937), have framed the Madras Spirit Rules, 1959 and the Rules have been brought into force from 1st April, 1959. In the said Rules methyl alcohol is defined in rule 2 (*e*) as under:

"'Methyl alcohol' means the liquid having the chemical formula CH_3OH. Its other

chemical names are methanol, carbonal and methyl hydrate and includes wood naphtha wood spirit, wood alcohol, pyrogallic spirits and pyroligneous spirits."

Rule 6 of the said Rules prohibits the possession, transport or storage of methyl alcohol except in accordance with the terms and conditions of a licence issued by the Government for such possession or permit for transport, as the case may be, rule 8 of the said Rules prescribes that if methyl alcohol is to be possessed and stored for purposes of use in the manufacture of specified commodities, a licence in the form known as D. L. 2 should be obtained by the person possessing or storing such methyl alcohol on payment of the prescribed licence fee based on the quantity of methyl alcohol to be stored. The Rules also provide for the licence being called upon to furnish security by way of cash deposit of such sum as may be prescribed by the Licensing Authority. Rule 10 (*ix*) provides for the levy of gallonage fee at the rate of 25 paise per litre on methyl alcohol obtained by a licencee from a distillery in the State or from sources outside the State. The present scale of licence fee prescribed under Rule 8 (*a*) is set out hereunder :—

Quota of spirit per annum	*Rate of licence fee from 1-4-1973*
	Rs.
Not exceeding 500 litres in case of educational institutions (schools, colleges, polytechnics, etc.)	25
Not exceeding 500 litres in cases other than educational institutions.	50
Above 500, but not exceeding 1000 litres.	100
Above 1000, but not exceeding 5000 litres.	200
Above 5000 but not exceeding 7500 litres.	300
Above 7500 but not exceeding 10000 litres.	500
Above 10000, but not exceeding 20000 litres.	1000
Above 20000, but not exceeding 40000 litres.	2000
Above 40000, but not exceeding 80000 litres.	3000
Above 80000, but not exceeding 10,00,000 litres.	4000
In excess of 1000000 litres.	5000

(The rate of licence fee for quantities in excess of one lakh litres has been wrongly given in the petitioner's affidavit as Rs. 5,000 for each slab of 1 lakh litres in excess of the first one lakh litres). Besides the licence fee, there is an obligation to pay gallonage fee at 25 paise per litre on the annual licenced quota and payment of security deposit equivalent to the gallonage fee. The effect of the combined levies, in the case of the petitioner company, it is averred, would result in payment of a sum approximately Rs. 20 lakhs per annum. The petitioner is therefore aggrieved with the Madras Spirit Rules, 1959 and the levy of fees thereunder and has come forward with the writ petition for issue of a writ of *mandamus* or other appropriate writ or order to direct the first respondent to forbear from enforcing the provisions of the Madras Spirit Rules, 1959 in so far as they relate to the levy of licence fee and gallonage fee or furnishing of security deposit in respect of methyl alcohol purchased, stored and used by the petitioner, from producers within or outside the State of Tamil Nadu.

4. In the affidavit filed in support of the writ petition, the petitioner impugns the validity of the Madras Spirit Rules, 1959, in so far as they relate to methyl alcohol, on the following grounds — Methyl alcohol does not fall either under Entry 8 or under Entry 51 of List II of the Seventh Schedule to the Constitution, because methyl alcohol is not alcoholic liquor as is envisaged under the Entries mentioned above, but is a totally different substance and wholly unfit for human consumption. It is not an intoxicating liquor, nor a liquor fit for human consumption, but on the other hand, methy

alcohol is a highly poisonous liquid, having a high rate of toxicity and consumption of even a small quantity of 30 ml. will have fatal consequences, while consumption of lesser quantities will result in blindness and other adverse consequences. Methyl alcohol is not also akin to denatured spirit but on the other hand, it is a denaturant. Methyl alcohol is a highly inflammable material and consequently, its possession, storage, transport etc. would be governed by the provisions of the Inflammable Substances Act (Central Act XX of 1952) as well as the Petroleum Act (Central Act XXX of 1934) and the Rules and Notifications issued thereunder. As a consequence thereof, the petitioner has obtained licences from the Chief Controller of explosives for transporting, storing and utilising methyl alcohol. In such circumstances, the State Legislature has no right to pass an Act and the State Government has no right to frame rules, treating methyl alcohol as an intoxicating liquor or as one fit for human consumption and impose restrictions or issue licences on payment of fees regarding possession transport, storage etc., of methyl alcohol. Even assuming that for some reason or other the State Government is entitled to issue licences for regulating the possession, storage etc., of methyl alcohol and to impose licence fee, such fee should be related to the cost of the service rendered by the State Government. The prescription of fees at slab rates and the fixation of a fee of Rs. 4,000 for quantities of 80,000 litres, but not exceeding 1,00,000 litres and at the rate of Rs. 5,000 for quantities, exceeding 1,00,000 litres, is unwarranted and unconscionable. Similarly, the levy of gallonage fee on the annual licensed quota and the requirement of security deposit are also illegal. The effect of the combined levy of the various fees will result in the petitioner being obliged to pay a sum of nearly Rupees twenty lakhs per annum and this would adversely affect the petitioner's business and make its products virtually unsaleable since there is no such levy in the other States in India like Maharashtra, Gujarat, West Bengal and Haryana where also, formaldehyde manufacturing units are established.

5. The contentions of the petitioner have been refuted by the first respondent in a detailed counter-affidavit filed by it. The first respondent has referred to the various provisions of the Prohibition Act which confer power upon the Government to prohibit the manufacture, traffic and consumption of liquor etc. except in accordance with the provisions of the Act, Rules and notifications and the power of the Government to issue licences and permits on payment of fees for import, transport manufacture and use of liquor, alcohol etc. Section 54 of the Prohibition Act has been specifically mentioned for asserting the powers of the Government to issue licences, permits, etc., and for framing rules for levy and collection of duties on all kinds of liquor, intoxicating drugs etc. It is then stated that methyl alcohol will also constitute liquor for the purpose of the Act, since section 3 (9) of the Prohibition Act is comprehensive in nature and includes not only spirits and denatured spirits, but also all liquors consisting of or containing alcohol. Reference is made to rule 2 (1) (*e*) of the impugned rules, as it comprehends methyl alcohol also and brings it within the scope of the Madras Spirit Rules. As methyl alcohol is also an intoxicant, the State Government, it is said, is entitled to regulate the purchase, transport and storage of methyl alcohol in exercise of its powers under Entry 8 of List II of the Seventh Schedule to the Constitution. The Rules in question are said to be a continuation of the old Rules, *viz.*, the Madras Denatured Spirit Rules, 1939. As the Rule is a pre-Constitutional law, it is saved under Article 372 of the Constitution. Methyl alcohol resembles ethyl alcohol very closely in appearance and is used for different purposes and when mixed with ethyl alcohol, as in the case of industrial spirit and methylated spirit, it is difficult to separate the two. Moreover, methyl alcohol is also used as an intoxicating beverage. Having regard to all these factors, the State Government is said to be entitled to exercise its powers under Entry 8 and Entry 51 of List II of the Seventh Schedule to the Constitution and regulate the use and possession of methyl alcohol by means of an appropriate licensing system and levy excise duty or countervailing duty. The licensing policy, it is claimed, is not peculiar to Tamil Nadu, but is a feature common in other States as well The counter-affidavit then deals with the other grievance of the petitioner, *viz.*, about the licence fee being

excessive and unrelated to the nature of the services rendered by the State Government. The stand of the first respondent is that the fee is a charge not only for the special services but also for the general services rendered by the different Governmental agencies. It is pointed out that a distinct set-up of departmental officers and agencies has to be maintained irrespective of the number of applicants coming forward for grant of licences DL 2 form. The imposition of licence fee on slab rates is justified on the ground that the greater the quantity of spirit required, the greater is the need for scrutiny and inspection and consultation with other departments. It is then said that without proper check and scrutiny, the spirits and liquors mentioned in the Rules are liable to be misused by a large number of persons, as proved by experience, and it is only on account of compulsive factors, the Government have chosen to enforce the Rules regarding a security deposit from 1st May, 1975. In the absence of a security deposit, it is averred, every case of contravention will have to be dealt, with only by cancellation of licence or filing of criminal prosecution. The impugned Rules are applied to about 1400 licensees in the State. Taking into consideration the prohibition policy of the Government and the welfare of the public, all kinds of alcohol and spirit including methyl alcohol and varnish, have been covered by the Rules in question. As regards the levy of gallonage fee, there is a specific provision for it in rule 10 (*ix*) and such a levy has been in vogue for a considerably long time. List II of the Seventh Schedule to the Constitution provides for the levy of fees in respect of any of the matters in the List and a similar provision is also made under Entry 96 of List I and Entry 47 of List III. Fees are thus leviable in the course of levy or collection of taxes apart from fees for licences. Fees, it has now become settled, is not a voluntary payment and hence there can be an element of compulsion in all cases while conferring a special benefit on an individual. Gallonage fee is a regulatory levy and has to be made in the interests of the administration and enforcement of the Prohibition Act. On the foot of such contentions, the first respondent would say that the petitioner is not entitled to the issue of any writ or order.

6. In addition to the counter affidavit, the first respondent has also furnished answers to the specific questions raised by the petitioner by means of an interrogatory. In the answers to the interrogatories, it is stated as follows—

1. D. L. 2 licence for possession of methyl alcohol under the Madras Spirits Rules, 1959, as originally enacted could be obtained free of licence fee.

2. Rule 8 was subsequently amended on 23rd January, 1964 and a licence fee of Rs. 15 was fixed for D. L. 2 licence.

3. The licence fee was subsequently raised to Rs. 20 and then to Rs. 100.

4. Under a later G. O. dated 29th November, 1973, the Government has fixed the licence fee for D. L. series licences having annual quota of 1,00,000 litres and above at Rs. 5,000.

5. The licence fee payable by the petitioner on the annual quota of 40,00,000 litres will not amount to Rs. 2 lakhs but only Rs. 5,000.

6. On the annual quota of 40,00,000 litres for the petitioner, the security deposit will amount to Rs. 10 lakhs. However, instead of depositing cash, Bank guarantee would be accepted by Government.

7. The petitioner need not execute an agreement agreeing thereunder to the Government being entitled to forfeit the security deposit in case of non-observance by the petitioner of the terms and conditions of the licence.

8. However, the security deposit is liable to forfeiture by Government for non-observance of the terms and conditions of the licence issued under rule 9 (*vii*) (*a*) of the Madras Spirit Rules, 1959.

9. Gallonage fee in respect of methanol will be 50 paise per bulk litre if imported and 25 paise if purchased within the State.

7. Mr. V. K. Thiruvenkatachari learned counsel for the petitioner contended that methyl alcohol or methanol is not an intoxicating liquor or liquor fit for human consumption and hence the State Legislature has no power to enact laws for regulating the manufacture, possession, transport, purchase

and sale of methyl alcohol or impose excise duty or countervailing duty upon the commodity. The learned counsel stated that in the Government of India Act, 1935, all aspects of intoxicating liquors *viz.*, industry, trade, production and distribution were taken out of Entries 24, 26 and 27 of List II and concentrated in one Entry *viz*, Entry 8. The term 'alcohol' comprehends many items such as, industrial alcohol, like denatured spirit, organic chemicals like methyl alcohol formaldehyde, acetic acid etc besides potable liquor. However, only other varieties of alcohol fall under Entries 24, 26 and 27. Consequently, there is a difference in the ambit and scope of legislation as regards potable liquor on the one hand and the other varieties of liquor on the other. The absolute right of the State legislature in matters relating to portable liquor, extending even to imposing total prohibition upon the trade, production and distribution of potable liquor was recognised, in *Bolo Prasad's case* (sic). After the Constitution the powers of the State Legislature to enact laws in respect of alcohol other than intoxicating liquor fall under Entries 24, 26 and 27 of List II of the 7th Schedule and since the freedom of trade guaranteed under Article 19 (1) (*g*) of the Constitution will cover these Entries also, the State Legislature has to make laws in such a manner that they will not conflict with Article 19 (1) (*g*). However, in respect of intoxicating liquor or potable liquor. Article 19 has to application and hence the State can claim monopoly rights by legislation, as has been done in the Tamil Nadu Excise Act. On account of these features, the categorisation of various kinds of alcohol in the appropriate Entries, is an inevitable concomitant. In the same manner in the matter of levy of excise also, a difference has to be maintained in the powers of the State between potable liquor falling under Entries 8 and 51 and other kinds of alcohol falling under Entries 24, 26 and 27. Since methyl alcohol is totally unfit for human consumption and is in fact a highly poisonous and inflammable commodity it cannot by any stretch of imagination be considered as potable liquor and subjected to licence fee and excise by the State Government. It was further urged that while section 3 (9) of the Prohibition Act referred only to denatured spirit and methyl alcohol or methylated spirit, the Madras Spirit Rules, 1959 purported to deal with methyl alcohol, methylated spirit and varnish also and the inclusion of those products was beyond the competence of the State.

8. It was then urged that the matter can be viewed from another angle also. Methyl alcohol on account of its being a highly inflammable material, is governed by the provisions of the Inflammable Substances Act (Central Act XX of 1952) and the Petroleum Act (Central Act XXX of 1934) and the Rules and Notifications issued thereunder. The petitioner has obtained licences under the abovesaid Acts and is therefore entitled to purchase, transport and utilise methyl alcohol for manufacturing formaldehyde in accordance with the terms and conditions of these licences. Hence the petitioner cannot be compelled by the State Government to obtain further licences under the impugned Rules.

9. Another contention put forward was that with effect from 8th May, 1952, organic heavy chemicals and industrial alcohol were included in the Schedule to the Industries (Development and Regulation) Act, (LXV of 1951). The effect of this will be that these items also will stand inserted in List 1, under Entry 52. As a result thereof, methyl alcohol industry, formaldehyde industry alcohol industry etc, would be covered by the declaration made by the Government with effect from 1st March, 1957. The resultant position would be that whatever articles are included by the Government of India under the Industries (Development and Regulation) Act, 1951, have to be taken as falling under Entry 52 as of List I and not comprised in Entry 1 of List II. The learned counsel urged that once a notification was made under the Industries (Development and Regulation) Act, so as to include methyl alcohol industry also as one of the controlled industries, then Articles 73 and 162 would be attracted and the executive power of the State will be subject to and limited by the executive power of the Central Government and, in addition, the State Executive will have no power under Article 298 (*b*) of the Constitution to exercise control over methyl alcohol industry.

10. Lastly, Mr. Thiruvenkatachari advanced arguments regarding the excessive and

unrealistic nature of the licence fee and gallonage fee. It was urged that the slab system of levy, if at all it can be justified, can be done only in the matter of taxation and not in the imposition of a licence fee which should always have a proper correlation to the services rendered. It was further stated that even if the slab system is held applicable to the imposition of licence fee the fee imposed should have nexus to the services rendered.

11. On the contentions put forth by Mr. Thiruvenkatachari three questions fall for our consideration *viz*

1. Whether the State Legislature, acting under Entry 8 of List II of the Seventh Schedule to the Constitution, has no legislative competence to demand a licence fee and levy gallonage fee in respect of methyl alcohol as it is not fit for human consumption?

2. Whether, by reason of the Notification issued under in Industries (Development and Regulation) Act, 1951, methyl alcohol will stand taken out of Entry 8 of List II? and

3. Whether the levy of licence fee at slab rates is wholly unrelated to the services rendered by Government and is harsh and oppressive?

12. The questions posed for consideration are not strictly *res integra* because they have already been considered by three High Courts and also by the Supreme Court, though all those cases but two did not relate to methyl alcohol Even so, we will examine the contentions of the petitioner's counsel in some detail. The Tamil Nadu Prohibition Act was introduced in 1937 for the purpose of bringing about prohibition, except for medicinal, scientific, industrial or such like purposes, of the production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors and drugs in the province of Madras. The word 'liquor' has been defined in section 3 (9) of the Prohibition Act as follows—

> "'Liquor' includes toddy, arrack, spirits of wine, denatured spirits, wines, beer and all liquid consisting of or containing alcohol."

Under section 4 of the Act, it is laid down that the import, export, transport or possession of liquor or any intoxicating drug or the manufacture of liquor or any intoxicating drug should be done only in accordance with the Rules made by the State Government in that behalf. Section 5 provides—

> "Whoever rendered or attempted to render fit for human consumption any spirit which has been denatured or any preparation containing such spirit shall be punished in the manner provided in the Act".

Under section 54, the State Government is empowered to make rules for the purpose of carrying into effect the provisions of the Act. In particular, the power to make rules is conferred in respect of matters relating to (*i*) issue of licences and permits and the enforcement of the conditions thereof and (*ii*) prescribing the ways in which the duty under section 18-A may be levied and collected on all kinds of liquors and drugs. In the year 1971, the Prohibition Act of 1937 was suspended by the State Legislature, but on the same date, the Tamil Nadu Excise Act, 1971 was enacted, section 83 of the said Act introduced a fiction and declared that all rules and notifications issued under the Prohibition Act of 1937 should be deemed to have been issued under the corresponding provisions of the Excise Act of 1971 and continue to have force. In the Excise Act of 1971, the word 'liquor' has been defined as follows—.

> "*Section 2 (16)*.—'Liquor' includes arrack, spirits of wine, methylated spirits, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol."

Subsequently, the suspension of the Prohibition Act was revoked in 1974, and the Act has come to be in force as before. It is in exercise of the powers under the Prohibition Act, 1937, and the rules framed thereunder, methyl alcohol is also subjected to control by means of appropriate licences issued by the Government on payment of licence fee.

13. Turning now, to the literature of methyl alcohol, we find that its chemical composition is CH_3 OH and it is a highly poisonous

liquid. It was originally obtained by destructive distillation of wood, but on account of scientific advancement it is now produced by synthetic process. Methyl alcohol is now increasingly required for industrial use in chemical industries. It has a high rate of toxicity and it is said that a dose of 250 ml. can cause death while intake of lesser quantities can lead to total blindness, convulsion, perspiratory collapse, respiratory failure, etc. It may have an alcoholic smell, but it is different from alcohol and is an organic liquid. On account of its highly inflammable nature, the storage, transport and use of methyl alcohol is governed by the provisions of the Inflammable Substances Act and the Petroleum Act and the Rules and Notifications issued thereunder. On the other hand, ethyl alcohol or ethanol, which is commonly referred to as alcohol, is an intoxicant and its chemical formula is C_2H_2CH, (C_2H_5OH--Ed.). Ethyl alcohol is used as an alcoholic beverage in suitable solutions. It is also used as a solvent in laboratory and industrial manufacture of denatured alcohol, pharmaceuticals and perfumeries. If ethyl alcohol is to be rendered unfit for human consumption or, in other words, if it is to be denatured, methanol is often used. Methanol is therefore a denaturant and not denatured spirit.

14. Having noticed the differences between methyl alcohol on the one hand and ethyl alcohol on the other, we will now consider whether the State Government is entitled to treat methyl alcohol also as potable liquor or intoxicating liquor. There is no denying the fact that in spite of methyl alcohol being dangerous and highly poisonous, it is not infrequently used as an intoxicant by ignorant or misinformed persons and, sometimes, knowingly too, by degenerate alcoholics. It is also common knowledge that unscrupulous adulterators mix methyl alcohol with potable liquor and pass on the preparations as a highly potent intoxicant to satisfy avid hard-core drinkers and the consumption of such liquor often leads to tragic consequences. It cannot, therefore, be said that methyl alcohol is either incapable of or is not being used as an intoxicant. May be, the use of methyl alcohol as an intoxicant would amount to an abuse of the product; but that will not detract from the position of its being used as an intoxicant. Since the policy of the Government under the Prohibition Act is to regulate the consumption of liquor in such a manner as will eventually fulfil the objective of Article 47 of the Constitution of India, it must be held that the State is entitled to exercise its powers under Entry 8 of List II, not only in respect of ethyl alcohol and preparations made therefrom, but also methyl alcohol, as the latter also is sought after and consumed, though mistakenly, as an intoxicant. We may appositely extract the view expressed by the Division Bench of the Andhra Pradesh High Court in *State of Andhra Pradesh* v. *Formalin and fine Chemicals Ltd.*[1] on this aspect of the matter :

"Sri Ramachandra Rao for the petitioner went to the extent of arguing that methyl alcohol does not come under clause (*b*) of S. 2 (21) of the Andhra Pradesh Excise Act, 1968, either. The basis of this contention is that methyl alcohol is not an intoxicating substance and unless it is an intoxicating substance, it cannot be declared to be liquor for the purpose of the Act under clause (*b*). Learned counsel's contention is that methyl alcohol is a highly dangerous substance and it is undrinkable, since it kills persons when it is drunk. We are not persuaded to accede to this submission. May be, it is ethyl alcohol that goes into the composition of ordinary alcoholic drinks. At the same time, it shall not be overlooked that dangerous and deadly substances also are used in some unauthorised and adulterated drinks. Taylor in the 12th edition of his book 'Principles and Practice of Medical Jurisprudence', says at page 381 of the volume—

'Of the various alcohols in common use in every day life, only ethyl and methyl alcohols are found in drinks, the latter only in

1. W.A Nos. 868 of 1975 and 256 of 1976 of A. P. High Court judgment, dated 13th November, 1976, since reported in (1978) Tax. L. R. 1603.

cheap adulterated spirits'. About methyl alcohol the same learned author says—

'In many parts of the country methylated spirit is used for drinking purposes in spite of addition of the dye and poisonous substances prescribed by the regulations'.

Glaster expressed similar opinion in his Medical Jurisprudence. Weiston and Gisvold in their Text Book of Organic Medical Pharmaceutical Chemistry, state—

'Ingestion of even small quantities of methanol produces a drunkenness similar to that of ethanol........

Keith Simpson in his 'Forensic Medicine' stated about methyl alcohol that it is an intoxicating spirit. Coming to Indian authors, Modi in his Medical Jurisprudence and Toxicology, expresses the following view at page 658 of the 19th edition—

'Methyl alcohol produces drunkenness less readily than ethyl alcohol, but its poisonous effect lasts longer as it is metabolished much more slowly and remains in the body for several days".

.......From the above opinion, it becomes clear that methyl alcohol, while being dangerous and often deadly in its effects causing blindness and death, is certainly capable of being used as an intoxicant and is, therefore, an intoxicating substance...... .."

It may thus be seen that the Division Bench of the Andhra Pradesh High Court has also taken the same view, as we have taken, *viz.*, that methyl alcohol, despite its toxic effects, is capable of being used as an intoxicant and can therefore be subjected to control by the State Government.

15. The subsidiary contention on the basis of the licences obtained under the Inflammable Substances Act (Central Act XX of 1952) and the Petroleum Act (Central Act XXX of 1934) and the Rules and Notifications issued thereunder, is also, in our opinion, without any force. Merely because methyl alcohol, on account of its high inflammability also calls for regulation under the Inflammable Substances Act and the Petroleum Act, the petitioner cannot contend that the power of the State Government under the Prohibition Act to exercise control over methyl alcohol as an intoxicant will stand obliterated in full manner. Having reached such a conclusion, we will now examine the case law on the subject.

16. In *Messrs Formalin and Fine Chemicals Ltd.* v. *State of Andhra Pradesh*[1], Chinnappa Reddy, J. (as he then was), had to consider whether methyl alcohol can be termed as liquor and whether the Andhra Pradesh Government could levy licence fee called 'import pass fee' on methyl alcohol in exercise of its powers under the Andhra Pradesh Excise Act, 1968, and the Andhra Pradesh Denatured Spirits and Denatured Spirituous Preparations Rules, 1971. The learned Judge held that though methyl alcohol is dangerous and often highly poisonous, causing blindness and death, it is occasionally used as an intoxicant by the ignorant and uninformed and perhaps by the degenerate an adulterator and the fact that it is capable of being used as an intoxicant is quite sufficient to make it an intoxicating substance which could be declared to be a liquor under section 2 (21) (*b*) of the Andhra Pradesh Excise Act and therefore, the relevant notification declaring methyl alcohol to be a liquor for the purpose of the said Act would be valid. On the further question as to whether the State Legislature had competence to legislate in regard to methyl alcohol, the learned Judge held that while Parliament is competent to legislate in regard to methyl alcohol as an inflammable substance, the State Legislature is equally competent to legislate in regard to methyl alcohol as an intoxicating liquor and as a poison. The order of Chinnappa Reddy, J., was affirmed by a Division Bench of the Andhra Pradesh High Court in *State of Andhra Pradesh* v. *Formalin and Fine Chemicals Ltd.*[2]

17. A Division Bench of this Court consisting of Ramaprasada Rao, C. J. and Rama-

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1. W. P. No. 3159 of 1973 of the A. P. High Court order, dated 11th July, 1975.
2. W. P. Nos. 868 of 1975 and 256 of 1976 of A. P. High Court, since reported in (1978) Tax L. R. 1603.

nujam, J., had to consider in *Maschemeijer Aromatics (India) P. Ltd* v. *State of Tamil Nadu*[1], whether the State Legislature acting either under Entry 8 or under Entry 51 of List II of the Seventh Schedule to the Constitution had power to control industrial alcohol and whether it had competence to demand licence fee in respect of industrial alcohol. The Bench held as follows—

"We are of the view that even if industrial alochol is not fit for human consumption and as such, is not an excisable article under section 2 (6) of the Act (Tamil Nadu Excise Act) it can be brought under control or regulation under the provisions of the Act in view of the wide definition of liquor even in section 2 (16) as including arrack, spirits of wine, Inmethylated spirits, spirits, wine, beer and all liquor consisting of or containing alcohol..........We have therefore to reject the petitioner's contention that industrial alchol, being unfit for human consumption, cannot be dealt with under the Tamil Nadu Excise Act."

18. As against the view taken in the abovesaid two cases, a Division Bench of the Kerala High Court has taken a different view in *Bombay Oil Industries, P. Ltd, Angamally* v. *Excise Inspector Excise Range, Angamally*[2]. It was held by the Division Bench that the mere fact that methanol is sometimes recklessly used by illiterate or uneducated persons could not afford sufficient reason for holding that methyl alcohol is a beverage or an intoxicating liquor. On such a finding, it was held that the definition of liquor in the Kerala Abkari Act will not take in methyl alcohol or methanol.

19. After these judgments were rendered, the Supreme Court has also rendered judgment in one case which will have very great relevance to the debate before us. In *State af Uttar Pradesh* v. *Synthetics and Chemicals Ltd.*[3], the imposition of vend fee under the Uttar Pradesh Excise (Amendment) Act XIII of 1972 on denatured spirit for grant of licence for wholesale vend of denatured spirit was challenged as being beyond the competence of the State Government. Therein also, the argument (*sic*) and hence the imposition of vend fee was beyond the competence of the State Legislature under Entries 8 and 51 of List II of the 7th Schedule to the Constitution. The Supreme Court's decision on the matter is in the following terms—

"We are unable to accept this contention, for in *Balsara's case*, after explicitly approving of the definition of the word 'liquor' in various Abkari Acts in the provinces of India, the Court held that liquor would not only cover alcoholic liquor which is generally used for beverage purposes and produced intoxication, but would also include liquids containing alcohol".

20. In another portion of the judgment, after referring to the earlier decisions of the Supreme Court, on the same subject, their Lordships have held as follows, at page 620—

"The decisions referred to above make it clear that the power to legislate under List II, Entry 8, relating to intoxicating liquor comprises of liquor which contains alcohol, whether it is potable or not".

(emphasis supplied)*

From the decisions referred to above, it may be seen that the more acceptable view to Courts including the Supreme Court is that whatever be the nature of the liquor, *i. e.*, whether it is potable or not, the State Government will be well within its power to legislate under List II, Entry 8, relating to intoxicating liquor. The decision in *Maschemeijer Aromatics (India) Pvt. Ltd.* v. *State of Tamil Nadu*[1], was criticised on the ground that the Bench had failed to notice that with effect from 28th August, 1974 the Prohibition Act had been revived and hence the power of the

1. W. P. Nos. 2871 and 2872 of 1973 of this Court order dated 16th April, 1979 reported in I.L.R. (1980) 2 Mad. 113.
2. O. P. Nos. 141 and 208 of 1975 of Kerala High Court order, dated 5th April, 1979 (I. L. R. (1979) 2 Ker. 199: (1980) Tax. L. R. 2258).
3. (1980) Tax. L. R. 2294 : (1980) 2 S. C. C. 441: (1980) 2 S. C. R. 531 : A. I. R. 1980 S. C. 614.

1. W. P. Nos. 2871 and 2872 of 1973 of this Court order, dated 16th April, 1973 reported in I. L. R. (1980) 2 Mad. 113.

*Emphasis not given in copy—Ed.

State Government to issue licence for purchase and use of industrial alcohol ought to have been considered with reference to the terms of the Prohibition Act and not the Tamil Nadu Excise Act. We are not persuaded by this contention, because the writ petitions were of the year 1973 and consequently, the Division Bench was called upon to decide the validity of the impugned Act as on the date of its issue *i e.*, when the Prohibition Act was suspended and the Tamil Nadu Excise Act was in force. Moreover, the finding of the Bench which is relevant for consideration in this case, is on the question whether industrial alcohol is intoxicating or potable liquor or not. The relevant portion in the order is in the following terms—

'In this view, the petitioner's contention that industrial alcohol, which is not fit for human consumption and therefore not excisable cannot be the subject-matter of control or regulation under the provisions of the Act loses all significance. We are of the view that even if industrial alcohol is not fit for human consumption and as such, is not an excisable article under section 2 (6) of the Act (Tamil Nadu Excise Act), it can be brought under control or regulation under the provisions of the Act in view of the wide definition of 'liquor' given in section 2 (16) as including attrack, spirits of wine, methylated spirits, spirits, wine, beer, and all liquor consisting of or containing alcohol. As per the scheme of the Act, 'liquor' as defined in section 2 (16) which includes within it alcohol which is fiit for human consumption can be controlled and regulated under the Act though for the purpose of levy of excise and countervailing duty, it is only alcoholic liquid fit for human consumption which is brought under the definition of 'excisable article' under section 2 (6). We have, therefore, to reject the petitioner's contention that the industrial alcohol, being unfit for human consumption, cannot be dealt with under the Tamil Nadu Excise Act."

We are in deferential agreement with the ratio contained in *State of Andhra Pradesh* v. *Formalin and Fine Chemicals Limited*[1], and *Maschemeijer Aromatics* (*India*) *Private Limited* v. *State of Tamil Nadu*[1], and, of course, we are bound by the ratio in *State of Uttar Pradesh* v. *Synthetics and Chemicals Limited*[2]. It is needless to say that we do not agree with the view taken by the Kerala High Court in *Bombay Oil Industries Private, Limited Angamally* v. *Excise Inspector, Excise Range, Angamally*[3]. Mr. Thiruvenkatachari argued that *State of Uttar Pradesh* v. *Synthetics and Chemicals Limited*[2], was concerned with denatured spirit which will fall within the category of alcohol and hence the decision can be distinguished. He further contended that in the Supreme Court case, it had not been contended than the State did not have competence to pass a law to monopolise for itself the trade and industry of denatured spirit and in such a situation, it was not open to the State to levy licence fee. We are not persuaded by this argument because, the debate is not whether methyl alcohol will amount to alcohol or not or whether the State must necessarily have monopolistic rights before levying licence fee, but it is whether methyl alcohol is consumed as an intoxicant or not, and if it is so consumed, whether, for the purposes of the Prohibition Act, the State can issue licence and levy a fee therefor. In that view of the matter, we think that the decision of the Supreme Court, though it related to denatured spirit, will be fully applicable to the facts of this case also. Mr. Thiruvenkatachari stated that a review petition has been filed against the decision of the Supreme Court in *Uttar Pradesh* v. *Synthetics and Chemicals Limited*[2], and the matter is pending consideration by the Supreme Court. Till now it has not been brought to our notice that the judgment has been reviewed by the Supreme Court and a different view has been taken in the matter. Hence we are bound by the ratio contained in the above said decision. The further contention that because of the petitioner having taken licences under the Inflammable Sub-

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1. W.A. Nos. 868 of 1975 and 256 of 1975 of Andhra Pradesh High Court judgment, dated 13th November, 1976, since reported in (1978) Tax. L. R. 1603.

1. W. P. Nos. 2871 and 2872 of 1973 of this Court order, dated 16th April, 1973.
2. (1980) Tax. L.R. 2294 : A.I R. 1980 S.C. 614.
3. O. P. Nos. 141 and 208 of 1975 of Kerala High Court. order, dated 5th April, 1979 since reported in I. L. R. (1979) 2 Ker. 199 : (1980) Tax. L. R. 2258.

stances Act, and the Petroleum Act, the State Government has no power to regulate the petitioner's use of methyl alcohol, by means of licence, has already been considered by us. We may only point out that in *State of Andhra Pradesh* v. *Formalin and Fine Chemicals Limited*[1], the same view was taken and it was held that the regulation of methyl alcohol as an inflammable substance will not take within it the regulation of methyl alcohol either as an intoxicating liquor or as a poison, and hence there is no hypothesis for the contention that the legislations by the Parliament and the State Legislature are in respect of the same matter. Hence the petitioner has to fail on the first question enunciated.

21. As regards the second poser, based on the notification of methyl alcohol industry, under the Industries (Development and Regulation) Act, 1951. the argument was that, by reason of the notification, methyl alcohol industry stood included under Entry 52 of List I and consequently. the State's power to legislate on methyl alcohol was taken away and only the Centre had power to govern the purchase, storage, transport etc. of methyl alcohol. Reliance was placed in this behalf on Articles 73 and 162 as well as Article 298 (*b*) of the Constitution, The argument of Mr. Thiruvenkatachari was that the notification made by the Central Government excludes the power of the State Government, to levy licence fee, etc. on methyl alcohol as it has been placed beyond the powers of the State to regulate the distribution of licences, permits etc., regarding methyl alcohol. The counsel further submitted that even if it could be taken that the State had originally power under Entry 8, List II, to issue licences *etc.* in respect of methyl alcohol, and impose licence fee on the footing that it is an intoxicating liquor, the power stood taken away from the State as soon as the notification was made under the Industries (Development and Regulation) Act, 1951, declaring methyl alcohol industry as one of the Industries falling under Entry 52 of List I.

22. We are not persuaded by this argument and, in fact, we can make short shrift of it in view of the pronouncement of the Supreme Court in several cases on the identical question. Even so, we would like to observe that once it is held that methyl alcohol can be treated as an intoxicating liquor and that the State is fully entitled, in exercise of iss powers under Entry 8, List II, to regulate its possession, storage, transport, etc., then merely by reason of methyl alcohol industry being notified under the Industries (Development and Regulation) Act, as falling under Entry 52 of List I, the State will not stand deprived of its powers under List II. By exercise of its powers under the Madras Spirits Rules, the right of anyone to manufacture methyl alcohol or to make use of methyl alcohol for manufacturing formaldehyde is regulated by the State. All that the State wants to achieve by means of the licensing system and payment of licence fees and security deposit, is the prevention of the use of methyl alcohol as an intoxicant. The control envisaged is, therefore, clearly one of a marginal or peripheral nature, and does not go to the heart of the matter. We will now refer to the decisions of the Supreme Court on this aspect of the matter.

23. In *Tika Ramji* v. *State of Uttar Pradesh*[1], the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act (XXV of 1953) whereunder specified cane purchasing centres were reserved or assigned to sugar factories, was assailed as unconstitutional on the ground that it trenched upon the exclusive powers of Parliament on a controlled industry falling under Entry 52, List I. The contention was not accepted and it was held as follows:

> "This comparison goes to show that the impugned Act merely confined itself to the regulation of the supply and purchase of sugarcane required for use in sugar factories and did not concern itself at all with the controlling of licensing of sugar factories, with the production or manufacture of sugar or with the trade and commerce in, and the production, supply and distribution of sugar. If that was so, there was no question whatever of its trenching upon the jurisdiction of the Centre in regard to the sugar industry which was a

1. W.A. Nos. 868 of 1975 and 256 of 1976, dated 13th November, 1976 ((1978) Tax. L. R. 1603).

1. 1956 S. C. J. 625: (1956) S. C. R. 393; A.I.R. 1956 S.C. 676.

controlled industry within Entry 52 of List I and the Uttar Pradesh Legislature had jurisdiction to enact the law with regard to sugarcane and had legislative competence to enact the impugned Act."

24. In *K. D. H. P. Co.* v. *State of Kerala*[1], the validity of the Kannan Devan Hills (Resumption of Land) Act, 1971 was questioned on the ground that the legislation trenched upon a controlled industry falling under Entry 52, List I. The contention was repelled in the following manner

> "It seems to us clear that the State has legislative competence to legislate on Entry 18, Liste II, and Entry 42, List III. This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. Effect is not the same thing as subject-matter. If a State Act, otherwise valid, has effect on a matter in List I, it does not cease to be a legislation with respect to an entry in List III."

5. In *Ganga Sugar Corpn.* v. *State of Uttar Pradesh*[2], the validity of the Uttar Pradesh Sugarcane (Purchase Tax) Act, 1961 was *inter alia* challenged as unconstitutional on the ground that sugar industsy was a controlled industry within the meaning of Entry 52, List I of the Seventh Schedule and hence Parliament alone was competent to make enactments under Article 246 (1) of the Constitution. After referring to *Tika Ramji* v. *State of Uttar Pradesh*[3] and *K.D.H.P. Co.* v. *State of Kerala*[1], the Court held as follows:

> "Industry' as a legislative topic is of large and liberal import: true. But what peripherally affects cannot be confused with what goes to the heart. An acquisition of land for sugar mills or of sugar mills may affect the industry but is not an action in the legislative field forbidden for the States. See *K.D.H.P. Co.* v. *State of Kerala*[1]. Sales tax on raw materials going to a factory may affect the costing process of the manufacture, but is not legislation on industrial process or allied matters. Indeed, if the State Legislature cannot go anywhere near measures which may affect topics reserved for Parliament, a situation of *reductio ad absurdum* may be reached."

1. (1972) K. L. T. 377 : A. I. R. 1972 S. C 2301.
2. (1980) 45 S. T C. 36 : (1980) 1 S. C. C. 223 : 1980 S. C. R. 769 : A. I. R. 1980 S. C. 286.
3. 1956 S. C. J. 625 : A. I. R. 1956 S. C. 676.

26. The last of the decisions is *State of Uttar Pradesh* v. *Synthetics and Chemicals Ltd.*[1]. In this case, the levy of vend fee under rule 15 of Para 680 of Uttar Pradesh Excise Manual, was challenged on the ground of legislative competence. One of the contentions raised was that by reason of the Notification under the Industries (Development and Regulation) Act, 1951, the Union had taken under its control the fermentation industries including the manufacture of industrial alcohol and as such, the levy of vend fee on denatured spirit by the State was beyond its competence The Supreme Court rejected the contention in the following terms:

> "Under Entry 33, List III the Parliament and the State have concurrent powers to legislate regarding the production, supply and distribution of the products of industries notified by the Parliament. Furthermore, it has to be noted that the exclusive power of the State to provide for manufacture, distribution, sale and possession of intoxicating liquor is vested with the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxicating liquor has also been recognised as is seen from the various Acts regulating manufacture. sale etc. of intoxicating liquor. A fair scrutiny of the relevant entries, makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List III. Entry 33 in the concurrent list enables a law to be made regarding production, supply and distribution of products of a notified industry."

27. Applying the ratio laid down by the Supreme Court in the abovesaid cases, we hold that the second contention of the petitioner must also fail.

28. There only remains for consideration the third contention of the petitioner regard-

1. (1980) Tax. L.R. 2294 : A.I.R. 1980 S.C. 614.

ing the excessive nature of the licence fee, gallonage fee and security deposit. We have already extracted the Table of licence fee, as per the amended Rules, and referred therein itself to the mistake contained in the petitioner's affidavit regarding the rate of licence fee for quantities of methyl alcohol exceeding one lakh litres. The amendment has not been noticed by the petitioner and hence the affidavit proceeds on the basis that the petitioner has to pay Rs. 4,000 towards licence fee for the first one lakh litres and an additional fee of Rs. 5,000 for each one lakh litres, in excess thereof. As a consequence of the amendment brought about in 1973, the petitioner has to pay, only a sum of Rs 5,000 towards licence fee for the entire quantity of 37.50 lakh litres of methyl alcohol, and not an amount running to some lakh of rupees as stated by the petitioner, This has also been conceded by the first respondent in its replies to the interrogatories of the petitioner. Even so, we will examine the petitioner's contention that the State has no right to fix licence fee on slab basis. The justification given by the State for levy of licence fees at slab rate is. that the greater the quantity of spirit required, the greater is he need for serutiny, inspection. consultation with other departments etc. The Constitution has drawn a clear distinction between the imposition of tax by a money bill and the impost of fees by any other kind of bill. In the Seventh Schedule also, both in List I and in List II. a distinction has been maintained in relation to the Entries of tax and fees. In the Union List, Entries 82 to 92-A relate to taxes and duties and Entry 96 carves out the legislative field for fees in respect of any of the matters in the said List except fees taken in any Court. Similarly, in the State List, Entries relating to taxes are Entries 46 to 63, and Entry 66 provides for fees in respect of any of the matters in List II, but not including fees taken in any Court. The entry relating to fees in List III is Entry 47. The Constitution therefore recognises a different and distinct connotation between taxes and fees.

29. In *Indian Mica and Macanites Industries Ltd.* v. *State of Bihar*[1]. His Lordship Hegde, J., speaking for the Bench enunciated the position of law as regards fee in the following terms :

"From the above discussion, it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlationship with the services rendered by the Government. In other words, the levy must be proved to be a *quid pro quo* for the services rendered. But, in these matters, it will be impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmetical exactitude."

30. The case law on the subject has been reviewed by the Supreme Court in a recent case. *Kewal Krishnan* v. *State of Punjab*[1], and the difference between tax and fee has been emphasised, besides pointing out how the levy of fee should have reasonable nexus to the services rendered by Government in return.

31. Examining the question whether the levy of licence fee at slab rates and the fixation of a fee of Rs. 5,000 for quantities of methyl alcohol in excess of one lakh of litres is, in any way, improper, we do not think the fee can be considered to be harsh and excessive. It cannot be denied that the State has to maintain a separate machinery, irrespective of the number of applicants, for grant of DL 2 licences and for ensuring that the licence conditions are fully observed. It is equally axiomatic that the greater the quantity of spirit that is required by a licensee, the greater is the need for scrutiny and inspection of the licensed commodity. If this is borne in mind, the attack on levy of licence fee on the basis of slab retes cannot be sustained. In this connection, we may appositely refer to the view taken in *Maschemeijer Aromatics (India) Pvt. Ltd.* v. *State of Tamil Nadu*, about the validity of the of licence fee on slab basis. The Division Bench held as fo lows ;

"Therefore the principal basis on which the slab system has been introduced appears to be substantially to rationalise the services *pro rata* i e , the smaller licensees

1. (1971) S. C. R. (Supp.) 319 : (1973) B. L. J. R 502 ; A. I. R. 1971 S. C. 1182.

1. (1979) 3 S. C. R. 1217 : (1980) 1 S. C. C. 416 : A. I. R. 1980 S. C. 1008.

2. W. P. Nos. 2871 and 2872 of 1973, dated 16th April, 1979, reported in I. L. R. (1980) 2 Mad. 113.

to pay a smaller licence fee and bigger licensees to pay a higher licence fee. Such a basis or notion, cannot be said to be foreign to the imposition of licence fee. We cannot, therefore, hold the levy of licence fee on the basis of slab system to be bad."

32. We are entirely in agreement with the abovesaid view. Hence, in our opinion, the levy of licence fee, on the basis of slab rates is not open to attack by the petitioner. Similarly, the demand of a sum of Rs. 5,000 as licence fee for the large quantity of methyl alcohol the petitioner would be requiring for its industry, cannot be considered as harsh or excessive.

33. Before taking up the question of gallonage fee, we can conveniently dispose of the petitioner's attack on the Government's demand for security deposit at the rate of 25 paise per litre. In the petitioner's affidavit the relevant rule has not been set out. The relevant rule is rule 9 (*vii*) (*a*). It reads as follows—

"(*Rule 9* (*vii*)—(a) Security—. In the case of applications for a licence in forms D.L. 1, D.L. 2, D. L. 4, D.L. 5. D.L, 6 or D.L. 8, the licensing authority, before granting the licence shall require the applicant to deposit with the Collector in cash or in Government promissory note, National Savings Certificate, Post Office Cash Certificate duly endorsed in favour of the Collector of the District concerned, as security for the due observance of the conditions of the licence, a sum calculated at the rate of twenty-five paise per bulk litre of the annnal quota proposed to be allowed under the licence for denatured spirit and/or methylated spirit and/or methyl alcohol, in respect of licence in form DL 1, DL 2, DL 4 and DL 5, and at the rate of fifty paise per litre of the annual quota of varnish proposed to be allowed under the licence in respect of licences in form DL6, and DL8. In the case of application for a licence in form DL 1, from a distillery, however, the security deposit to be required shall be calculated at the rate of five paise per bulk litre of the annual quota of denatured spirit and methylated spirit and methyl alcohol. In case of non-observance of the terms of the licence the security so deposited may be forfeited to Government and the licence cancelled, provided that no forfeiture of deposit shall be made unless the licensee has had a reasonable opportunity of showing cause against such a forfeiture :

Provided that the total amount of such security shall not, in each case, exceed one lakh of rupees ...."

(Second proviso, introduced by G. O. Ms. No. 109, Home, dated 14th January, 1981. omitted as not relevant.)

34. We have extracted the Rule in order to point out that the petitioner's contention that it will have to pay security deposit at the rate of 25 paise per litre for all the 37.50 lakhs of litres allotted to it, is not a correct contention. The maximum amount that has to be offered as security deposit either in the form of cash or Government promissory notes, National Savings Certificates etc., is only Rs. one lakh. Having regard to the large quantity of methyl alcohol which will be held by the petitioner, the deposit of Rs. one lakh by way of security, cannot be said to be excessive. Though the said amount is liable to forfeiture, the liability will occur only if the petitioner contravenes any of the terms and conditions of the licence and that too, only after issue of show cause notice to the petitioner. Hence we do not think there is any basis for the petition er to feel aggrieved about the deposit of security.

35. As far as the gallonage fee is concerned, the relevant rule is rule 10 (*ix*) and the rule reads as under—

"A gallonage fee at the rate of twenty-five paise per litre (or at such other rate as may be fixed by the Government from time to time) shall be levied on (*a*) denatured spirit/methylated spirit/methyl alcohol, exported by holders of licences referred to in rule 4 of these rules to other States in the Indian Union, or obtained by holders of licences or others who are exempted from taking out

licence under these rules from a distillery in the State; and (*b*) denatured spirit/methylated spirit/methyl alcohol or varnish obtained from sources outside the State. In the former cases, the fee shall be paid to the distiller by the purchaser at the time of purchase of stock from the distillery. In the latter case of imports, the amount of gallonage fee at the above rate calculated for the quantity proposed to be imported shall be paid into the treasury in the district concerned and the treasury receipt/chalan shall be enclosed with the application for import permit....."

36. This Rule has now been changed by G. O. Ms. No. 28, Prohibition and Excise, dated 12th May, 1981, and it is now provided that vend fee shall be payable by the holder of the distillery licence under rule 6 of the Tamil Nadu Distillery Rules, 1981.

37. If the matter is viewed in its proper perspective, the petitioner's attack on the levy of gallonage fee cannot be sustained. Methyl alcohol, we have already held, lends itself open to be treated as an intoxicant by the State and, once this position is reached, then the State, under its regulatory powers, has the right to effectively control all forms of activity in relation to methyl alcohol. In exercise of such powers, the State is empowered to levy gallonage fee at a rate prescribed by it. As pointed out in *Har Shankar* v *Dy. E. and T. Commr.*[1], the amount charged on the licensee by way of gallonage fee is not a fee properly so called, nor indeed a tax, but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction. We may usefully refer, once again, to *State of Uttar Pradesh* v. *Synthetics and Chemicals Ltd*[2]., because in that case, a similar contention was raised regarding the vend fee levied by the State of Uttar Pradesh. The argument there was that the words 'foreign liquor' cannot be understood as including denatured spirit and hence vend fee cannot be levied on denatured spirit. The Supreme Court observed as follows:

> "We are unable to give the words 'foreign liquor' such a restricted meaning for the word 'consumption' cannot be confined to consumption of beverage alone. When liquor is put to any use such as manufacture of other articles the liquor is all the same consumed".

In our opinion, what applies to denatured spirit must also hold good for methyl alcohol. The resultant position will be that the petitioner's attack on the levy of gallonage fee cannot also be sustained. Hence the petition has to fail on this contention also.

38. For the aforesaid reasons, we hold that the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, do not suffer from want of legislative competence either on the ground that methyl alcohol falls outside the purview of Entry 8 of List II of the Seventh Schedule to the Constitution or on the ground that methyl alcohol industry has been included in Entry 52 of List I of the Seventh Schedule and hence subjected to the exclusive control of the Union. We also find the attack on the levy of licence fee, gallonage fee and the provisions relating to security deposit, to be devoid of substance. Consequently, the Writ petition has to fail and it will accordingly stand dismissed.

39. W. A. No. 8 of 1980 as already stated, is directed against the order of V. Ramaswami, J., in W. M. P. No. 5832 of 1979 filed for the purpose of including respondents 2 to 4 as parties to the writ petition. The only ground urged is that for the purpose of dealing with the judgments in W. P. Nos. 2871 and 2872 of 1973. Tax Case No. 300 of 1974 and W. P. 5465 of 1975, the appellant will have to refer to the letter of Intent granted to E. I. D. Parry Ltd., for the manufacture of methanol and the application made thereunder under the Industries (Development and Regulation) Act, and hence it is absolutely necessary that respondents 2 to 4 should be added as parties to the present writ petition. Since we have considered the matter in all relevant aspects,

1. 1975 Tax. L. R. 1569; (1975) 1 S. C. C. 737: A.I.R. 1975 S. C. 1121.
2. 1980 Tax. L. R. 2294: A. I. R. 1980 S. C. 614.

we do not think it necessary that the proposed respondents are necessary parties to the writ petition. Hence the writ appeal also has to fail and it will stand dismissed. There will however, be no order as to costs in the writ petition or the writ appeal.

ORDER

Natarajan, J.—Learned counsel for the petitioner seeks leave to appeal to the Supreme Court against our judgment under Article 133 (1) (*a*) read with Article 134-A of the Constitution of India on the ground that substantial questions of law of general importance which need determination by the Supreme Court, arise in the case. According to the learned counsel, the questions of law which need determination by the Supreme Court are as follows:—

1. Whether the State Legislature is competent to legislate on methanol/industrial alcohol licensed under the Industrial (Development and Regulation) Act and in respect of which declarations have been made under Entry 52 of List I?

2. Whether the State Government has no power of (to?) levy gallonage fee on methyl alcohol/(methanol)/industrial alcohol under Entry 8 and Entry 51 of List II? and

3. Whether the decision reported in *State of Uttar Pradesh* v. *Synthetics and Chemicals Ltd.*[1], would apply to the facts of this case?

We are not inclined to grant leave, because we have followed the decisions of the Supreme Court, though not with reference to methanol/methyl alcohol, regarding denatured spirit falling within Entries 8 and 51 of List II of the Seventh Schedule to the Constitution and the power of the State Government not being taken away in spite of the notification of the industry under the Industrial (Development and Regulation) Act. Hence we decline to grant leave and the oral application for leave will stand dismissed.

S. J. —— *Petition and appeal dismissed.*

1. (1980) 2 S.C.C. 441 : A.I.R. 1980 S.C. 614.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. Fakkir Mohammed, J.*

Ramaswamy Pathar ... *Petitioner**

v.

Thiagaraja Chettiar ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (2) (i)—Wilful default, what is—Landlord allowing rents to get accumulated—Practice in business community—Receiving the same whenever needed, not wilful default by tenant in payment of rent.

Held, that it is usual for business people to get the rents accumulated as savings. If the landlord was particular about the stipulation in the lease deed for the payment of rent every month, he would not have allowed the tenant to keep the rents accumlated for being paid whenever the landlord wanted and demanded. [*Para* 3.]

If the landlord was away from the building and the tenant made delay in paying rent, there is possiblity of wilful default on the part of the tenant. In the instant case, the landlord being a businessman would not have allowed the tenant to commit wilful default constantly unless be had not allowed the tenant to pay the rent in lump sum [*Para* 4.]

Cases referred to:—

M. Nagalinga Josier v. *Trust for Building belonging to T. K S. A. R. Punniyappa Nadar*, (1972) 2 M. L. J. 623 : 85 L. W. 738 : A. I. R. 1973 Mad. 270 ; *Lingambhosala Subbaya* v. *The Subordinate Judge, Vijayawada*, (1951) 1 M. L. J. 514 : 64 L. W. 396 : A. I. R. 1951 Mad. 864 (2) ; *Komalam Amual* v. *Ashoka Cycle and Motor Company*, (1980) 1 M. L. J. 194

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act

*C. R. P. No. 1910 of 1981. *17th December*, 1981.

XVIII of 1960 as amended by Act XXIII of 1973 to revise the decree of the Sub-Court Mayuram, dated 19th March, 1981 in C. M. A. No. 107 of 1980-R. C. O. P. No. 19 of 1980, Rent Controller, D. M C., Mayuram.

A. Venkatachalam, for Petitioner.

D. C. Krishnamurthi, for Respondent.

The Court made the following

ORDER.—The revision petition has been filed by the tenant against the order of the Appellate Authority, namely, the Subordinate Judge, Mayuram, dated 19th March, 1981 in C. M. A. No. 107 of 1980 allowing the appeal preferred by the landlord against the order of dismissal of R. C. O. P. No. 19 of 1980 by the Rent Controller (District Munsif), Mayuram, dated 9th September, 1980. The landlord had filed R. C. O. P. No. 19 of 1980 under section 10 (2) (*i*) of Act XVIII of 1960 on the ground of wilful default by the tenant in paying the arrears of rent of Rs. 320 at the rate of Rs. 20 per month from 1st December, 1978 till the end of 31st March, 1980. The defence raised by the tenant was that the landlord used to receive the rents in lump sum once in six months or once in a year as he had requested the tenant to allow the rents to accumulate and pay the same in lump sum so that it would serve a substantial purpose, and that the tenant has been in occupation since 1960 though a renewal lease deed was executed on 2nd September, 1971. The learned Rent Controller has upheld the plea of the tenant relying upon the evidence of P. S. 1 to say that the tenant used to pay the rents once in two months or four months after demand was made by P. W. 1, and that therefore, there was no wilful default on the part of the tenant. On appeal, the learned Subordinate Judge has relied upon *M. Nagalinga Josier* v *Trust for Building belonging to T. K. S. A. S. Punniyappan Nadar, Sons*[1], and *Lingambhosala Subbaya* v. *The Subordinate Judge, Vijayawada and others*[2], and found that even though the tenant had pleaded that the landlord used to receive the rent once in six months or once in a year, the tenant has not produced any katchayat book to prove such plea and that the tenant has committed wilful default since he has not paid the arrears of rent for nearly 16 months.

2. The learned counsel for the petitioner has argued that the tenant is also occupying a shop about two or three shops away from the shop of the landlord, that if there was no custom of receiving the rent once in three months or four months or one year, the landlord would have taken immediate steps to evict the tenant and that under the *Explanation* to section 10 (2) (*i*) the presumption of wilful default cannot be raised since the tenant has immediately remitted the entire arrears of rent of Rs. 340 on receipt of the lawyer's notice along with the original of Exhibit A-2 reply notice. In support of such argument, he has relied upon the belated lawyer notice served by the landlord after having kept quiet for about 16 months. But the learned counsel for the landlord states that because he was lenient, it cannot be said that he was receiving the rents in lumpsum.

3. Admittedly, the tenant has been in occupation from 1960. The fact that the tenant has been paying rents in lumpsum is also admitted. In the present case, before the issue of lawyer's notice, the landlord who was occupying a shop of his own very near the demised premises had kept quiet for 16 months and then sent the lawyer's notice. The landlord has admitted both in chief examination and cross-examination that the tenant used to pay the rents once in two or four months or six months. In between 1960 and 5th April, 1980 there was no notice at all by the landlord to the tenant The landlord is doing jewellery business and the tenant is also doing goldsmith business. It is not as though the landlord is depending upon the rent paid by the tenant. The shop is situated at Thirumanjana Veedhi Bazar, Koranad at Mayuram. It is usual for business people to get the rents accumulated as savings. If the landlord was particular about the stipulation in the lease deed for the payment of rent every month, he would not have allowed the tenant to keep the rents accumulated for being paid whenever the landlord went and demanded.

4. It can be understood if the landlord was away from the building and the tenant made

1. (1972) 82 L. W. 738 : (1972) 2 M. L. J. 623: A. I. R. 1973 Mad. 270.

2. (1951) 1 M. L. J. 514 : 64 L. W. 396 : A. I. R. 1951 Mad. 864 (2).

delay in the payment of rent, that there is possibility of wilful default on the part of the tenant Here, the landlord who is a businessman would not have allowed the tenant to commit wilful default constantly, unless he had not allowed the tenant to pay the rent in lumpsum. It is such a contingency that has been considered in *Komalam Ammal* v. *Ashoka Cycle and Motor Company*[1]. Here the presumption of wilful default cannot be made since the tenant has paid the entire amount immediately after receipt of the notice, explaining his stand. In the circumstances, the conclusion of the Rent Controller that there was no wilful default is quite correct and the decision of the Appellate Authority is not correct. Therefore, the order of the Appellate Authority is set aside. The revision petition is allowed, but in the circumstances, without costs, and the order of the learned Rent Controller is upheld.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Shanmukham, J.*

T. P. Kunhiraman Proprietor, International Typewriter Emporium ... *Appellant**

v.

The Official Assignee, Madras ... *Respondent.*

Presidency Towns Insolvency Act (III of 1909), section 39—Application for discharge by insolvent—Circumstances to be considered—Payment of 0.25 ps. in a rupee, one of such circumstances—Failure to provide payment—Not an absolute condition to refuse discharge—Law of bankruptcy—object.

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1. (1980) I M. L. J. 194.

*I. P. No 59 of 1975 and A. No. 27 of 1982. 30*th April*, 1982

In this case, the order of adjudication was made as early as on 19th December, 1975. The law of bankruptcy does not expect that the debtor should always be the slave of the creditors. The object is to release the debtor at the appropriate time, taking into consideration the several factors referred to in section 39 of the Presidency Towns Insolvency Act, 1909. [*Para.* 3.]

Section 39 states that the Court has no discretion but to reject discharge if the insolvent has committed any offence under the Act or under sections 421 to 424, Indian Penal Code. That does not arise in this case. So far as the second limb of section 39 is concerned, it is left to the discretion of the Court to refuse discharge or suspend discharge for a specified time or grant conditional discharge. No doubt the Court has the duty to take into consideration the several factors set out in section 39 (2). If has to be noted that it is the totality of all the factors enumerated in section 39 (5) that will have an impact on the order to be passed under section 38. [*Para.* 4.]

As regards the complaint that the insolvent had not provided 0.25 ps. in a rupee, by way of dividend, it is one among several circumstances the Court has to take into consideration while dealing with an application for discharge. In a case where there is a fair probability of the debtor providing in a reasonable period the minimum of 0. 25 ps. in the rupee as dividend the Court shall not hesitate in granting discharge. In the instant case, he will have to remain an undischarged insolvent almost till his lifetime if this condition were to be imposed as a general rule, for it would take 161 months to make up Rs. 32,300 at Rs. 200 per month. The above illustration gives the clue that that was not the intent of the Legislature in making that provision. [*Para* 5.]

G. Nandalal, for Appellant.

K. Radhakrishnan, M. Prakash Goklaney and *R. Sivakumar*, for opposing creditors.

The Official Assignee, in person.

The Court made the following

ORDER.—The insolvent's application for discharge, though has the recommendation of the Official Assignee, is stoutly opposed by the two opposing creditors. The grounds of objection are : (1) The insolvent has not provided even the statutory minimum of 0.25 ps. in the rupee by way of dividend; (2) The insolvent is still carrying on business, can continue to carry on business and therefore, is in a position to discharge the debt if he were to be continued to be insolvent for some more time; (3) The insolvent has not maintained proper accounts; (4) The insolvent has suppressed his assets deliberately, because he has got large stock of typewriters which he had not handed over to the Official Assignee.

2. It is seen from the report filed by the learned Official Assignee that the stock in trade was sold in public auction for Rs. 14.541, the unexempted household articles realised Rs. 1,767 and the insolvent's car was sold for Rs. 5,500. As regards the lease-*cum*-sale agreement with the Tamil Nadu Housing Board the insolvent's son was prepared to pay the Official Assignee a sum of Rs. 15,364, which was duly paid. Under Orders of this Court, dated 24th December, 1975 the insolvent was permitted to carry on his business in servicing, and repairing typewriters, subject to the condition that he paid on an average Rs. 200 per month to the Official Assignee.. He has paid the allocation till September, 1981. He has to pay allocation amounting to Rs. 1,200 till March, 1982.

3. The order of adjudication was made as early as on 19th December, 1975. The law of Bankruptcy does not expect that the debtor should always be the slave of the creditors. The object is to release the debtor at the appropriate time, taking into consideration several factors referred to in section 39 of the Presidency Towns Insolvency Act, 1909.

4. Section 39 states that the Court has no discretion but to reject discharge if the insolvent has committed any offence under the Act or under sections 421 to 424, Indian Penal Code. That does not arise in this case. So far as the second limb of section 39 is concerned, it is left to the discretion of this Court to refuse discharge or suspend discharge for a specified time or grant conditional discharge. No doubt the Court has the duty to take into consideration several factors set out in section 39 (2). It has to be noted that it is the totality of the factors enumerated in section 39 (2) that will have an impact on the order to be passed under section 38.

5. As regards the complaint that the insolvent has not provided 0.25 ps. in a rupee, by way of dividend, I am to state that it is one among several circumstances, the Court has to take into consideration while dealing with an application for discharge. I have already pointed out that the debtor should not remain an undischarged insolvent for ever. In a case where there is a fair probability of the debtor providing in a reasonable period the minimum of 0.25 ps. in the rupee as dividend the Court shall hesitate in granting discharge In the instant case, he will have to remain an undischarged insolvent almost till his lifetime if this condition were to be imposed as a general rule, for, it would take 161 months to make up Rs. 32,300 at Rs. 200 per month. The above illustration gives a clue that that was not the intent of the Legislature in making that provision.

6. Though an insolvent, every man is entitled to make his living or to earn his liveli hood at least to pay the monthly allocation in the interest of creditors. In this matter the insolvent had the permission of this Court in carrying out his job. He is admittedly a technician and by using his skill he was able to eke out his livelihood. No doubt while so doing, he had to purchase rotten and abandoned typewriters and the like, make them fit for use on account of his skill and thereafter dispose of such machines and in the process what he obtained for his skilled labour was the margin that was left out. This naturally necessitated the insolvent to either purchase machines on credit or on borrowing, then discharge the said liabilities after the sale of the machines. It cannot therefore be contended that the insolvent is dealing actually in typewriter machines. It is also complained that the insolvent has under his employment several others. In my opinion that will not stand in the way of the insolvent obtaining a discharge. While carrying out his manual as also skilled work, if it was necessary that he should have the assistance

of others, certainly he must have such assistance and that is solely for eking out his livelihood. As a matter of fact, in this case, the insolvent has paid Rs. 200 on an average per month. I therefore, find no substance in the above objection.

7. As regards the non-mainteance of, proper accounts, the creditors had the opportunity of cross-examining the insolvent in the course of his public examination. I am informed that none of the opposing creditors even availed of the opportunity to cross-examine the insolvent at that time. It is admitted that account books were produced by the insolvent before the Official Assignee. Therefore I am not prepared to accept the objection that the insolvent had not maintained proper accounts.

8. There is no evidence that the insolvent is having a large stock of typewriters and hence this objection also cannot be entertained.

9. One other objection that was pressed into service is that the insolvent had borrowed recklessly and this has brought him to the insolvency Court. Unfortunately, if any needy debtor were hard-pressed for a loan or did not have any creditor to lend him on easy terms (*sic*) the blame cannot exclusively be laid at doors of the insolvent alone. Even this objection does not survive.

10. In this case, the applicant was an undischarged insolvent for nearly 8 years. He has completed his 60th year and I feel it is high time that he is relieved of this stigma viewed with utmost contempt by the society, at least in the evening of his life.

11. The result is, the application is accepted and discharge is granted, however, subject to the condition that the insolvent deposits Rs. 1,400 on or before two monthr from this date.

R. S. —— *Discharge granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam and V. Sethuraman, JJ.*

N. Chellappan Pillai and another ... *Petitioners**

v.

A. Anthoni and others *Respondents.*

Travancore Limitation Regulation (VI of 1100 M.E.) section 20, Article 136 of first Schedule, Part B States Laws Act (III of 1951), section 6, Limitation Act (XXXVI of 1963 section 30—Suit for redemption and partition filed on 2nd January, 1971—Othi and kuzhikkanam deed of 1895 — Purakkadom deed of 1913—Properties in erstwhile Indian State of Travancore—Suit whether barred by limitation —Trial Court decreeing suit and first Appellate Court dismissing the suit — Second Apped by plaintiffs — Suit held to be within time.

The plaintiffs filed a suit for redemption and partition on 2nd January, 1971, based on an Othi and Kuzhikkanom deed of the year 1895 and Purakkadom deed of the year 1913. The properties were in Kanyakumari district which was a part of the former Indian State of Travencore. By virtue of section 20 of the Travantcore Limitation Regulation, limitation had to be computed from the date of the Purakkadom deed, if there was one subsequent to the mortgage deed. Article 136 of the first Schedule to the Travancore limitation regulation prescribed 50 years for redemption of a mortgage. Accordingly, a suit could have been filed on or before 1963. Before the expiry of this period, Part B States Laws Act (Central Act III of 1951) extended the Indian Limitation Act, 1908 to Part B states and repealed the Travancore Limitation Regulation. The result was to extend the period of limitation for redemption to 60 years. Thus in the present case a suit could have been filed on or before 1973. The Indian Limitation Act, 1908 was substituted by the Limitation Act, 1963 which reduced the period of redemption to 30 years. However by virtue of

* S. A. No. 2061 of 1977, *24th June,* 1981.

section 30 of the Act of 1963, a suit for redemption could be filed within seven years from the commencement of the Act on 18th April, 1964. The period of seven years would expire on 31st March, 1971. The trial Court passed a preliminary decree for redemption which was reversed by the lower appellate Court. The plaintiffs filed the Second Appeal.

Held, the plaintiffs had an extended period of limitation from the date of the purakkadom notwithstanding Parliament extending the Indian Act to the erstwhile Travancore territory and by reason of section 30 of the Limitation Act of 1963, the plaintiffs could institute a suit on or before 31st March, 1971. [*Para. 13.*]

Cases referred to:—

Syed Youssuf v *Syed Mohammed,* (1967) 2 S. C. R. 318 : (1967) 2 S. C. J. 244 : (1967) 2 An. W. R. (S. C.) 58: (1967) 2 M. L. J. (S. C.) 58: A. I. R. 1967 S. C. 318 ; *Rajah of Pittapur* v. *Venkatasubba Rao,* (1916) I. L. R. 39 Mad. 645 : 29 M L. J. 12: L. W 661 : 30 I. C. 94 (F.B.); *Thomas* v. *Victor,* (1976) 2 M. L. J. 5 : 89 L. W. 164 : A I. R 1976 Mad 273 ; *Nachiappa Goundan* v. *Samiappa Goundan,* (1949) 2 M. L J. 35 : A. I. R 1947 Mad. 18 ; *Parameswaran Thampi* v. *Kanakamma Thankkachi,* (1977) 90 L. W. 258 ; *State of Punjab* v. *Mohan Singh Partap Singh,* 1955 S. C. J. 25 : (1955) I S. C R. 893 : A I. R 1955 S. C. 84 ; *Ponnian Nadar* v. *Thaveethu Nadar,* (1979) 92 L. W. 158.

Appeal against the decree of the Sub-Court, Nagercoil in A. S. No. 386 of 1976 preferred against O. S No. 121 of 1971, District Munsif's Court, Kuzhiturai.

Miss O. K. Sridevi and *N. Rajan,* for Appellants.

T. R. Rajagopalan, T. R. Rajaraman, V. Selvarajan and *V. Narayanan,* for Respondents.

(Pursuant to an order of reference to the Bench dated 9th December, 1980 made by Nainar Sundaram J., this appeal coming on for hearing the Court delivered the following Judgment

The Judgment of the Court was delivered by

Sethuraman, J.—The above second appeal arises out of a suit for redemption and partition, laid by the plaintiffs, who are the appellants herein. This suit was based on Exhibit A-1, a copy of the othi and kuzhikkanom deed, dated 32, 12, 1070 M. E. and Exhibit A-2, a copy of the purakkadom deed, dated 22-11-1088. M. E. 1070 M. E corresponds to 1895 and 1088 to 1913 of the Gregorian calender. The first Court passed a preliminary decree allowing the plaintiffs to redeem their 1/8th share on their depositing the proportionate mortgage and purakkadom amount of Rs. 33.19 and granting them the relief to recover possession of their share from the defendants. In the appeal the learned Subordinate Judge of Nagercoil held that the suit ought to have been filed before 1967, and that as it has been filed only on 1st February, 1971 it was clearly barred by limitation. The result was that he dismissed the suit and, therefore, the unsucessful plaintiffs came forward with the present appeal.

2. The appeal originally came before Nainar Sundaram, J., who referred to three decisions of this Court, which expressed three different views. He was of the opinion that the question raised in this case required an authoritative answer from an appropriate Bench, and, therefore, the matter was referred to a Bench.

3. The substantial question on which the second appeal has been admitted is:

> "Whether the plaintiffs' suit for redemption is barred by limitation as held by the lower appellate Court".

The properties are situated in Kanyakumari district which was a part of the Indian State of Travancore. Till the accession of the said State with the rest of India, the State had enacted its own laws and regulations. Under Article 136 of the First Schedule to the Travancore Limitation Regulation (VI of 1100) (M.E.), the period of limitation for redemption of a mortgage was 50 years from when the right to redeem and recover possession accrued. The same Regulation contained section 20 (1) providing as follows—

"If, before the expiration of the period prescribed for the redemption of a mortgage, the mortgagee accepts from the mortgagor a Puravaippu or Purakadam deed creating a further charge on the mortgaged property and duly registered, the prescribed period of limitation shall be computed from the date of such Puravaippu or Purakadom deed."

4. It has already been seen that the mortgage deed is of the year 1895. The period of 50 years for redemption would expire in 1945. By virtue of section 20 of the Travancore Limitation Regulation, the limitation had to be computed from the date of Purakadom deed, if there was one subsequent to the mortgage deed.

5. In the present case, as already seen, there was a Purakadom deed of the year 1913, and, therefore, a suit could have been filed on or before 1963. Thus in the present case, it was possible to file a suit for redemption till 1963.

6. Before the expiry of that period of limitation, Parliament enacted the Part B States Laws Act, 1951 (Central Act III of 1951) which came into force on 1st April, 1951. By that Act, several enactments enacted by the Indian Legislature were extended to Part B States and one of the enactments so extended was the Indian Limitation Act of 1908. That Act repealed also the Travancore Limitation Regulation. The result of the extension of the Indian Act was to extend the period of limitation for redemption to 60 years, as that was the period available under the Indian Act of 1908. Thus, in the present case, a suit could have been filed on or before 1973.

7. At this stage it is necessary to refer to two provisions of Central Act III of 1951. The first is section 30 thereof, which ran as follows—

"Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by any law corresponding to this Act in force in a Part B State which is repealed by the Part B States (Laws) Act, 1951 (III of 1951) may be instituted within the period of two years next after the coming into force of this Act in that Part B State or within the period prescribed for such suit by such corresponding law, whichever period expires first."

It may be seen that this provision applies to cases where the consequences of the application of the Indian Act reduced the period of limitation from what was available under the State Regulation. In the present case, the period available under the State Regulation was 50 years and that under the Indian Act was 60 years. The consequence of the introduction of the Indian Act of 1908 was to extend the period and not to reduce the period of limittation; section 30 would have no scope for application and, therefore, there was no obligation on the part of the plaintiffs to institute a suit within the period of two years contemplated by section 30.

8. The other provision to which reference requires to be made is section 6 of the Central Act III of 1951 which to the extent relevant runs as follows—

"If immediately before the appointed day there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall save as otherwise expressly provided in this Act, stand repealed:

Provided that the repeal shall not affect—(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder; or (*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or (*c*) ... (*d*),,,,,,"

There is also a proviso which is not relevant for our present purpose. It is necessary to emphasise here that Parliament had considered it necessary to specifically to enact section 6 of Central Act III of 1951, even though in the case of a repeal, there is a similar provision available already under the General Clauses Act. By reason of section 6 of Central Act III of 1951, any right acquired under the repealed law is saved and preserved.

9. Section 61 of the Transfer of Property Act, which was also extended to the erstwhile Travancore State, provided for consolidation of mortgages by Central Act XX of 1979. Section 61 before the 1929 amendment ran as follows—

> "A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying the money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem."

Section 61 after the 1929 amendment runs as follows—

> "A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together".

10. While under the unamended law, it was necessary for the mortgagor, who had executed several mortgages in favour of the same mortgagee over the same property, to redeem all of them together, under the amended law, he is entitled to redeem any of them without at the same time redeeming the others. Thus, the principle of consolidation, which was available up to 1929 amendment, was taken away by that Act. In view of the specific provision in section 6 of Central Act III of 1951, the right which had been acquired by the two mortgages, or had accrued in favour of the mortgagee to insist on the mortgage as well as the purakadom having redeemed together was not affected by the Central Act III of 1951.

11. The normal rule is that the law of limitation applicable to the suit is the law in force at the date of the institution of the suit. See: *Syed Yousuf* v. *Syed Mohammed*[1]

1. (1967)2 S. C. J. 244: (1967)2 An. W. R. (S.C.) 58: (1967)2 M. L. J. (S. C.) 58: (1967) 2 S. C. R. 318: A. I. R. 1967 S. C. 1318.

There is equally a well-known principle that retrospective operation ought not to be given to a statute so as to take away vested rights, unless that effect cannot be avoided without doing violence to the language of the enactment, and that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. See *Rajah of Pittapur* v. *Venkatasubba Rao*[1]. Thus even in the absence of section 6 of Central Act III of 1961, that Act (*sic*) cannot be taken as affecting the vested rights available under the Travancore Limitation Regulation. In effect, the period of limitation had to be computed from the date of the Purakadom. The position is a *fortiori* because of section 6, which preserves the continuance of the vested rights acquired under the repealed statute.

12. The Indian Limitation Act, 1908, was substituted by the Limitation Act, 1963. Under the new Limitation Act, the period of redemption of mortgages was reduced to 30 years. A special provision was, however, made in section 30 of the 1963 Act, reading as follows—

> "Notwithstanding anything contained in this Act ... (*a*) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of seven years after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier..."

The period of seven years was substituted for five years by the Limitation (Amendment) Act, 1969 (X of 1969) and the provision is deemed to have been so enacted from the commencement. Thus the plaintiffs had a period of seven years from 1st April, 1964, when the Indian Limitation Act of 1963 came into force. The period of seven years would thus expire on 31st March, 1971, and the suit was filed on 2nd January, 1971.

13. In the light of the above discussion, the plaintiffs had an extended period of limita-

1. (1916) I. L. R. 39 Mad. 645: 29 M. L. J. 1: 2 L. W. 661: 30 I. C 94 (F. B.).

tion from the date of purakadom notwithstanding Parliament extending the Indian Act to the erstwhile Travancore territory, and by reason of section 30 of the Limitation Act of 1963, the plaintiffs could institute a suit on or before 31st March, 1971.

14. We may now examine the three decisions which are cited in the Order of Reference by Nainar Sundaram, J. The earliest decision chronologically is that of Mohan, J. in *Thomas* v *Victor*[1]. This judgment is dated 19th September, 1975. In that case, the suit property was mortgaged on 3rd February, 1076 (M. E.) and there was a purakadom on 7th April, 1093 (M. E.). The purakadom stated *inter alia* that the possession under the mortgage was to be on the basis of the purakadom alone. In 1966 the plaintiff in that case filed a suit for redemption of the mortgage of 1076 and the purakadom of 1093. He was faced with the defence that the suit was time-barred. The learned Judge held that the right to consolidation was a vested right and that in view of the recitals in the purakadom, the two mortgages would be consolidated so that piecemeal redemption was impossible. The learned Judge relied on *Nachiappa Goundan* v. *Samiappa Goundan and another*[2]. in support of his view, that the right of consolidation was not a mere right to have the advantage of an existing status and that it was a vested right in property, There is nothing in this decision which runs counter to the view that we are taking. We do not, think it is necessary to refer to this decision more elaborately.

15. The next one is the decision of Varadarajan, J. as he then was, in *Parameswaran Thampi* v. *Kanakamma Thankachi and others*[3], the judgment having been pronounced on 2nd December, 1975. In that case, there was a mortgage of 1886 and a subsequent charge of 1915 in favour of the mortgagee. The suit was filed in 1969 for redemption (the documents refer to the years in Malayalam Era). The defence was that the suit was barred by limitation. The learned Judge was of the view that after the Amendment Act XXVIII of 1929, amending section 61 of the Transfer of Property Act, the mortgagee was not entitled to insist on the mortgagor redeeming the subsequent charge. In the view of the learned Judge—

> "Therefore, after the Amendment Act XXVIII of 1929, the mortgagee was not entitled to insist on the mortgagor redeeming the charge created under the original of Exhibit A-2, before he could redeem the mortgage created under Exhibit A-1. Therefore, it would follow that after the Limitation Act, 1908 had been made applicable to the area concerned by the Part B States (Laws) Act III of 1951, in absence of any provision in the Limitation Act, 1908, corresponding to section 20 of the Limitation Regulation VI of 1100 M. E. it was open to the mortgagor to redeem the mortgage covered by Exhibit A-1 alone (of the year 1886) and it was not open to the mortgagee to insist on the redemption of the charge created by the original of Exhibit A-2 (of the year 1915), before the mortgagor could be allowed to reedeem the mortgage covered by Exhibit A-1. The Limitation Act, 1908, had been made applicable to the area with effeet from 1st April, 1951, and the mortgagor has to redeem the mortgage covered by Exhibit A-1 within sixty years from the date of its execution, namely, 25th June, 1886 and the suit filed only in 1969 is clearly barred by limitation..."

Though reference appears to have been made to section 6 of the Part B (States Laws) Act at page 260 of the judgment, the effect of that provision does not appear to have been properly appreciated. Section 6 as given in the judgment proceeds as if there was a mere repeal without the saving to which we have made reference earlier. As the Part B States (Laws) Act (III of 1951) has preserved the rights acquired under section 20 of the Travancore Limitation Regulation, which is a vested right, the operation of section 20 would continue with reference to this instrument. The Supreme Court has pointed out in the *State of Punjab* v. *Mohan Singh Partap Singh*[1],

1. (1976) 2 M. L. J. 5: 89 L. W. 164: A. I. R. 1976 Mad. 273.
2. (1946) 2 M. L. J. 35: A. I. R. 1947 Mad. 18.
3. (1977) 90 L. W. 258.

1. 1955 S. C. J. 25: (1955) 1 S. C. R. 893: A. I. R. 1955 S. C. 84 at 88.

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destory them. We cannot therefore, subscribe to the broad proposition that section 6 of the General Clauses Act, is ruled out when there is repeal of an enactment followed by a fresh legislation. section 6 would be applicable to such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of section 6."

Thus the line of enquiry, as to the consequence of the introduction of the Indian Law by Central Act III of 1951 is to find out whether it manifests an intention to destroy the old rights acquired under the Travancore Limitation Regulation. Section 6 of the same Act itself manifests an intention not to destroy these rights. Consequently, the absence of a provision corresponding to section 20 of the Travacore Limitation Regulation in the extended Indian Law will not have the effect of confiscating the rights acquired by the plaintiffs. We are, therefore, unable will respect to agree with the view which commended itself to the learned Judge in *Parameswaran Thampi* v. *Kanakamma Thankachi and others*[1].

16. The last decision is that of Ismail, J. as he then was in *Ponnian Nadar and others Thaveethu Nadar and others*[2]. In that case, also, there was a mortgage of 1859 followed by a purakadom of 1906. The suit for redemption was filed in 1964. It was held that the suit was not barred by limitation and the reasoning of the learned Judge is that there is nothing either in the Indian Limitation Act, 1908, or in the provisions contained in the Central Act III of 1951, to take away or destroy the right available to the plaintiff under section 20 of the Travancore Limitation Regulation and that consequently, notwithstanding the repeal of the Travancore Limitation Regulation and the extension of the Indian Limitation Act, 1908, to the area in question, the mortgagor was held to have the right to compute the period of limitation prescribed by the Indian Limitation Act from the date of the purakadom, that is, from 1909. As the suit, was filed in 1964, it was held that it was within time. We agree with the reasoning and conclusion of the learned Judge with respect. The result is, we restore the decision of the trial Court decreeing the suit and reverse the decision of the lower appellate Court. The appeal is accordingly allowed. There will be no order as to costs.

S. J. —— *Appeal allowed.*

1. (1977) 90 L. W. 258.
2. (1979) 92 L. W. 128.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*Balasubrahmanyan and Padmanabhan, JJ.*

The Workmen of Buckingham and Carnatic Mills represented by the General Secretary, Buckingham and Carnatic Mills Staff Union Madras-2 and others ... *Petitioners**

v.

The State of Tamil Nadu represented by the Secretary to Government, Labour and Employment Department, Fort St. George, Madras-9 and others ... *Respondents.*

Constitution of India (1950), Article 226, Industrial Disputes Act (XIV of 1947), section 12—Writ of mandamus—*Nature and scope—Commissioner of Labour acting under section 12 of the Industrial Disputes Act—Commissioner's duties administrative in nature—Settlement between a company and its workmen contractual in nature—Writ of* mandamus *cannot lie to enforce the settlement.*

A writ of *mandamus* is a command issued by a Court to a person holding a public office or against a corporation or inferior Court for enforcement of duties which under the law for the time being in force are clearly incumbent upon such person or Court in his or its public character or corporation in its corporate character. [*Para.* 20.]

The writ of *mandamus* is an extraordinary remedy. It is in form a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. So long as the duty that is sought to be referred is in the nature of a public duty, it is not necessary that the person or the authority on which the duty is imposed should be a public official or an official body. It is further necessary that the person claiming a writ of *mandamus* must have a legal right to the performance of a legal duty by the one against whom the writ in sought [*Para.* 23.]

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* W. P. Nos. 11488 and 11489 of 1981.

7th April, 1982.

The Commissioner of Labour while acting under section 12 of the Industrial Disputes Act as Conciliation Officer, is not invested with the power to adjudicate an industrial dispute. All that he can do is to try to persuade the parties to come to a fair and amicable settlement. In other words, his duties are only administrative and are purely incidental to industional adjudication. [*Para.* 24.]

If any of the parties to the settlement is aggrieved by the non-implementation of the terms of the settlement by the other party, then the remedy of the aggrieved party would be to move the Government for sanction to prosecute the party in breach under section 25. There is nothing in the Act or the Rules imposing a statutory duty on the Commissioner of Labour to seek the enforcement of a settlement entered into between the management and workmen under section 12 (3) of the Act. [*Para* 24.]

The scope and amplitude of Article 226 are wide. A person or authority to be amenable to the juridiction of the High Court under Article 226 need not fall under the cetegory of 'other authority' within the meaning of Article 12 of the Constitution. The person referred in Article 226 must be a person to whom a writ will lie according to the well-established principles depending upon the nature of the writ sought for. [*Para.* 36.]

The implementation of the settlement entered into by a company with its workmen (under section 12 (3) of the Industrial Disputes Act) cannot be called a duty which is in the nature of a public duty. The obligation arising under be settlement is purely contractual and a writ of *mandamus* cannot issue for the enforcement of a contractnal right. [*Para.* 38.]

Cases referred to :—

Dabour (D. R. S.K. Burman) v. *The Workmen*, (1968) 1 M. L. J. (S. N.) 8 ; *Sohan Lal* v. *Union of India*, 1957 S. C. J. 489 : 1957 S. C. R. 738 : (1957) 2 An. W. R. (S. C.) 50 : (1957) 2 M. L. J. (S. C.) 50 : A. I. R. 1957 S. C. 529 ;. *Praga Tools Corporation* v. *C. V. Imanual*, (1970) 1 S. C. J. 91 : (1970)

1 An. W. R. (S.C.) 29 : (1970) 1 M. L. J. (S. C.) 29 : (1969) 3 S. C. R. 773 : (1970) 1 Comp. L. J. 50 : (1969) 1 S.C C. 585 : A. I. R. 1969 S. C. 1306; *Sukhdev Singh* v. *Bhagatram*, (1975) 1 S. C C. 421 : (1975) 3 S. C. R. 619 . A. I. R. 1975 S. C. 1331; *Macullough* v. *Maryland*, (1819) 4 Wheat. 316; *Pfizer* v. *Ministry of Health*, (1964) 1 Ch. 614; *New-York* v. *United States*, (1945) 326 U. S. 572; *Helvering* v. *Gerhardt*, (1937) 304 U. S. 405; *South Carolina* v. *United States*, (1905) 199 U. S. 437; R. *D. Shetty* v. *The International Airport Authority of India*, (1979) 2 L. L. J. 217; *Som Prakhsh Rekhi* v. *Union of India*, (1981) 1 S. C. J. 458 : 51 Comp. Cas. 71 : 57 F. J. R. 370 : (1981) 1 S. C. C. 449 : A. I. R. 1981 S. C. 212 : ((1981) 2 S. C. R. 111 : (1981) 1 L. L. J. 79; *Ajay Basia* v. *Khalid Hujib Suhrawardi*, (1981) 1 L. L. J. 103; *Managing Director* v. *Vijay Narayan Vajpayee*, (1980) 1 L. L. J. 222; *Gadea Nagabhushanam Reddi*, In re I. L. R. (1950) Mad. 1119 : (1950) 2 M. L J. 278 : 63 L. W. 781 : A. I. R. 1951 Mad. 249; *Thippaswami*, In re (1951) 2 M. L. J. 171 : 64 L. W. 665 : A. I. R. 1952 Mad. 112; *Indian Tobacco Corporation* v. *State of Madras*, (1954) 1 M. L. J. 429 : I. L. R. (1954) Mad. 754 : A. I. R. 1954 Mad. 549; *Garishad Mineral Water Manufacturing Co., Ltd* v. *H. M. Jagtiani*, A. I. R. 1952: Cal 315; *India Sugar Mills Association* v. *Secretary to Government, U. P. Labour Dept.*, (1950) All. L. J 767 : I. L. R. (1952) 1 All. 186 : A. I. R. 1951 All. 1 (F. B.); *United India Fire and General Insurance Co., Ltd.* v. *A. A Nathan*, (1980) 1 L L. J. 369 : (1981) Lab. I. C. 1076; *T. Gattaiah* v. *Commr. of Labour*, (1981) 1 An. W. R. 259 : (1981) Lab. I. C. 942 : (1981) 2 L. L. J. 54; *M. M. Pathak* v. *Union of India*, (1978) 1 L. L. J. 406 : (1978) Lab. I. C. 613; *L. I. C.* v. *D. J. Bahadur*, (1981) 1 L. L. J. 1 : (1980) Lab. I. C. 1218: A. I. R. 1980 S. C. 2181.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue writs of *mandamus* (*i*) directing the second respondent to prohibit the third respondent from laying off the staff until such time the voluntary retirement scheme is implemented as per Clause (*v*) of the Memorandum of undertaking which is annexed as Annexure' to the Settlement, dated 6th June, 1981 (in W. P. No. 11488 of 1981). (2) directing the second respondent to take all measures to see that the 3rd respondent implements Clause (*v*) of the Memorandum of understanding which is annexed as Annexure 'A' to Settlement, dated 6th June, 1981 reached under section 12 (3) of the Industrial Disputes Act by offering voluntary retirement to the extent of the Staff found excess as a result of the revised manning strength (in W. P. No. 11489 of 1981).

N. G. R. Prasad for *M/s. Row* and *Reddy* and *R. Rajaram*, for Petitioners.

S. Jagadeesan, for Government Pleader, for Respondents 1 and 2.

V. P. Raman for *M/s. King* and Partridge, Advocates, for 3rd Respondent.

The Judgment of the Court was delivered by

*Padmanabhan, J.**—The prayer in the writ petitions filed by the Buckingham and Carnatic Mills Staff Union is for the issue of a writ of *mandamus*, directing the second respondent—Commissioner of Labour, Madras to prohibit the third respondent—The Management of Binny Limited (Buckingham and Carnatic Mills Unit) from laying off the Staff until such time the voluntary retirement scheme is implemented as per clause (*V*) of the Memorandam of understanding which is annexed as Annexure 'A' to the settlement dated 6th June, 1981. In substance the petitioners are seeking a writ of *mandamus* to compel the second respondent—Commissioner of Labour to enforce a settlement arrived at between the parties under section 12 (13) of the Industrial Disputes Act. One of the questions, therefore, that arises for adjudication in the writ petition is the jurisdiction of this Court under Article 226 of the Constitution of India to issue a writ of *mandamus*, directing the Commissioner of Labour to enforce a settlement arrived at between the management and the workmen under section 12(3) of the Industrial Disputes Act. (*K. Kalaimani and 114 others* v. *Government of India, Ministry of Commerce, By its New Delhi of Secretary and others*[1], was filed by some of the employees of the Buckingham and Carnatic Mills against the management as well as the Commissioner of Labour, for an identical relief. Ramanujam, J., before

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* 10th February, 1982.

1. W. P. No 11168 of 1981.

whom the writ petition came up for admission, dismissed the writ petition *in limine.* The learned Judge has rendered an elaborate judgment and has come to the conclusion that once there is a section 12 (3) settlement between the management and its workmen, then the matter becomes a binding contract between the contracting parties and thereafter the relationship is purely contractual and if there is any breach of the settlement or its terms by any of the parties, then that matter has to be agitated elsewhere and not in proceedings under Article 226 of the Constitution.

2. While Mr. V. P. Raman, learned counsel for Buckingham and Carnatic Mills would state that the question of the maintainability of the writ petition is concluded by the judgment of Ramanujam, J., Mr. Prasad, learned counsel for the petitioners would contend that the view taked by Mr. Justice Ramanujam, regarding the maintainability of the writ petition is not correct and requires reconsideration. The learned counsel also would urge that the said judgment is not binding on me as it was dismissed at the stage of admission and has therefore no binding effect.

3. No doubt, as rightly contended by Mr. Prasad, this decision cannot be a binding precedent on me as it has been dismissed at the stage of admission (*Vide—Dabur* (*D. R.S. K. Burman*) v. *The Workmen*[1]. However, I am satisfied that the learned Judge, while disposing of the earlier petition, had elaborately considered the matter. In the circumstances. I feel that in substance, the correctness or otherwise of the view taken by Ramanujam, J., has to be considered. Further, the question raised is of some importance and is of frequent occurrence under the provisions of the Industrial Disputes Act. I therefore consider it as appropriate that the matter should be heard and disposed of by a Bench. The Writ Petition will be therefore placed before my Lord, the Officiating Chief Justice for appropriate directions as to the writ petition being posted before a Bench.

4. Mr. Prasad, learned counsel for the petitioners states that in view of the urgency of the matter he got a date fixed for the expeditious disposal of the writ petitions and that is why the writ petitions had appeared at the top of the list. Learned counsel therefore makes a fervent appeal that the matter should be directed to be placed before the Bench at the top of the list. Any direction regarding the posting has only to be done by my Lord, the Officiating Chief Justice. I therefore commend for the consideration of my Lord, the Officiating Chief Justice. the plea made by Mr. Prasad for an early posting of the case before a Bench.

5. These petitions coming on for hearing in pursuance of the aforesaid reference, on Thursday and Friday the 25th and 26th days of February, 1982 and Monday the 1st day of March, 1982 in the presence of the said Advocates and having stood over for consideration till this day, the Court made the following Order:-

The judgment of the Court was delivered by

Padmanabhan, J.—These two writ petitions have been filed by the General Secretary of the Buckingham and Carnatic Mills Staff Union and two others: In W. P. No. 11489 of 1981, the petitioners have prayed for the issue of a writ of *mandamus* directing the second respondent, Commissioner of Labour, Madras, to take all measures to see that the third respondent, M/s Buckingham & Carnatic Mills Ltd., hereinafter referred to as the Management, implements Clause (*v*) of the Memorandum of Understanding which is annexed as Annexure 'A' to the Settlement, dated 6th June, 1981 reached under section 12 (3) of the Industrial Disputes Act, by offering voluntary retirement to the extent of the staff found excess as a result of the revised manning strength. In W. P. No. 11488 of 1981, the petitioners have prayed for the issue of a writ of *mandamus* directing the second respondent to prohibit the third respondent from laying off the staff until such time the voluntary retirement scheme is implemented.

6. The facts leading to the filing of the writ petitions may be stated as follows:- The B & C Mills in which about 10,000 workers and 1029 staff members (Administrative and Technical) were employed was closed on 1st January, 1981. Thereafter, attempts were made by members of Parliament belonging to various political parties in Tamil Nadu and the Minister for Commerce, Government of India, to find out ways and means of reopen-

1. (1968) 1 M. L. J. (S. N.) 8.

ing the Mills to avoid a number of workers being rendered jobless. This resulted in a memorandum of understanding being arrived at on 28th March, 1981. The said memorandam was signed by the then Joint Secretary, Department of Textiles, Ministry of Commerce, Government of India, and the B & C Workers Union representing the staff and the workmen. The said memorandum of understanding declared that a representative of the Tamil Nadu Government would assist the workers union and the Management to arrive at a settlement. The memorandum of understanding further provided for a revised workload/productivity/manning/staff pattern to be given effect from the date of reopening of the mills and the date limit for implementation of the revised workload/productivity/manning/staff pattern was fixed as from the date of reopening of the mills. Just before the reopning of the mills, a settlement was entered into between the management of B & C Mills and the workmen before the Commissioner of Labour under section 12 (3) of the Industrial Disputes Act, hereinafter referred to as 'the Act' and rule 25 (1) of the Industrial Disputes Rules, hereinafter referred to as 'the Rules'. It is the case of the petitioners that the memorandum of understanding dated 28th March, 1981 contained a voluntary retirement scheme which permitted the employees to voluntarily retire with retirement benefits of 50 per cent. of the emoluments (wage and dearness allowance only) last drawn (to be paid in lump sum or monthly on the option of the voluntarily retiring employee) till he reached the age of retirement fixed under the standing orders *viz*, 58 years. It is the case of the petitioners that the management did not act in terms of the memorandum of understanding and also in terms of the settlement entered into between the parties under section 12 (3) of the Act. The mills were reopened on 19th June, 1981. On the reopening of the mills contrary to the terms contained in the memorandum of understanding dated 28th March, 1981, and section 12 (3). Settlement dated 6th June, 1981, the management laid off about 270 persons as surplus staff without allowing them to take advantage of the voluntary retirement scheme envisaged under clause (*v*) of the memorandum of understanding.

8. In this context, it may also be mentioned that the petitioners by a letter dated 7th August, 1981, called upon the management to extend the benefit of voluntary retirement scheme to the said 270 persons. This was not accepted by the management. Thereupon, the petitioners made a representation to the Commissioner of Labour. The Commissioner of Labour, the second respondent, held discussions between the management and members of the union. Thereafter, the Commissioner of Labour addressed the first respondent, the Government of Tamil Nadu, to refer to the Industrial Tribunal, Madras, the issue relating to the question of interpretation of the settlement arrived at between the parties on 6th June, 1981, for adjudication. On 18th November, 1981, the Government requested the Commissioner of Labour to advise the management and the union to settle the various issues between the management and workmen amicably. The Commissioner of Labour, Madras in turn advised the petitioners and the management accordingly. It is in these circumstances, the petitioners have filed these writ petitions.

9. Before dealing with the various contentions advanced by the counsel for the petitioners as well as the management and respondents 1 and 2, it is necessary to set forth the terms of the memorandum of understanding dated 28th March, 1981, and the settlement, dated 6th June, 1981. Clause (*i*) of the memorandum of understanding states that talks between the B & C Mills and the workmen would commence with immediate effect with a view to consider proposals to improve existing workload/productivity/manning and to prescribe appropriate wage norms. A representative of the Tamil Nadu Government would assist in the talks. His decisions in disputed matters would be final subject to concurrence by the Central Government. As and when sectorial workload/productivity/manning/appropriate wage norms were settled, they would be implemented on that ground. Clause (*ii*) provided that from the date of reopening of the mills, it would revert to 7-day 24 hour working. Clause (*iii*), which is the most relevant clause for the purpose of these writ petitions, deals with the voluntary retirement scheme. Both operative and non-operative staff of B & C Mills who had completed the age of 54 years as on 1st January, 1981, would be entitled to take adventage of the voluntary retirement scheme. The option under the scheme has to

be exercised within 30 days of the commencement of the scheme. The persons who opt for such scheme would be permitted to voluntarily retire with retirement benefits of 50% of the emoluments till he reached the age of retirement which was 58 years under the standing orders. The emoluments would take in only the wage and dearness allowance last drawn. The amount would be paid in lump sum or monthly at the option of the employees who volunteer to retire under the scheme. The benefit would be available in addition to the other benefits available to the employees under the Act. The clause envisages that about 1223 workers and 104 non-operative staff would opt for the scheme. If, however, that number of employees do opt to retire under the voluntary retirement scheme, the offer would be extended to those employees who had completed the age of 50 years on 1st January, 1981. However, in the case of those persons, compensation would be restricted to 50% of the emoluments for a period of 24 months, irrespective of their age. The clause further states that even after this extension if sufficient number of people to take up the figure of 1327 personnel do not opt to voluntarily retire, the number required to make up the expected strength would be laid off. Clause (*iv*) states implementation of the scheme of voluntary retirement would be after the revised workload/productivity/manning/appropriate wage norms mentioned in clause (*i*) was settled and implemented. Clause (*v*) states that the difference, if any, between the appropriate manning strength as arrived at on the basis of the norms mentation in clause (*i*) and, the manning strength that results consequent to the implementation of the voluntary retirement scheme as provided for in clause (*iii*) would be adjusted by extension of the voluntary retirement scheme further on the basis of age, failing which the surplus, if any, would be laid off. The settlement dated 6th June, 1981, entered into between the management and the workmen before the Commissioner of Labour, Madras, under section 12(3) of the Act states that the memorandum of understanding dated 28th March, 1981, should be treated as an integral part of the settlement. It is not necessary to refer to the other clauses in the settlement, dated 6th June, 1981.

10. On 30th March, 1981, One Thiru Kamalarathnam, I. A. S. (Retired) was nominated by the Tamil Nadu Government as representative to decide the manning strength in terms of clause (*i*) of the memorandum of understanding. On 2nd May, 1981, Thiru Kamalarathnam called upon the employees between the age group of 54 years and 58 years to exercise their option in a prescribed form to go on voluntary retirement. As against the envisaged strength of 104 members of the Staff only 87 offered to retire under the voluntary retirement scheme. Therefore, on 9th May, 1981, Thiru Kamalarathnam issued notices to the petitioners' Union and the workmen extending the voluntary retirement scheme to the lower age group. On 21st May, 1981, he announced that the new manning strength for the staff is 607, but subsequently revised it to 619. The result of the determination of the manning strength was that the number of staff was brought down from 1029 to 619. On the basis of the new manning strength determined as 619, 410 members of the staff would be entitled to take advantage of the voluntary retirement scheme. 87 persons had already opted to retire pursuant to the notice issued by Thiru Kamalarathnam on 2nd May, 1981. Consequently, the management was bound to offer the voluntary retirement scheme to the remaining 323 employees. The grievance of the petitioners is that there is no justification on the part of the management to refuse the benefit of voluntary retirement scheme to these 323 members of the staff and these persons should not be laid off.

11. The case of the management is that the writ petitions themselves, being mainly directed against the third respondent—management, are not maintainable on those grounds. Firstly, the B & C Mills is not a public authority and consequently, this Court would have no jurisdiction to issue any writ in exercise of its powers under Article 225 of the Constitution. Secondly, the settlement entered into between the management and the representative of the Union under section 12 (3) of the Act, was in the nature of a contract between the management and its workmen. Further, the petitioners have got an adequate and effective remedy under the provisions of the Act for the redress al of their grievance arising out of the threatened lay

off. Further, it would be equally open to the petitioners to move the first respondent-Government of Tamil Nadu to refer any question with regard to the interpretation of clauses in the memorandum of understanding dated 28th March, 1981, for adjudication by the Industrial Tribunal, Madras. As a matter of fact, the petitioners have approached the Government of Tamil Nadu for referring the question of interpretation of clause (*v*) of the memorandum of understanding for adjudication by the Industrial Tribunal Madras, and the matter is receiving the attention of the Government In the circumstances. the writ petitions themselves not maintainable. It is then contended that the Commissioner has no powers either under the provisions of the Act or otherwise to issue any directions to the third respondent in the manner prayed for in the writ petitions The counter-affidavit further proceeds to state that the voluntary retirement scheme was commenced on 8th May, 1981, for workmen above 54 years of age. It was extended to lower age groups in terms of clause (*iii*) of the memorandum of understanding. In terms of the memorandum of understanding, the workmen and the staff had only 30 days to exercise their option to take advantage of the voluntary retirement scheme. Consequently. Thiru Kamalarathnam refused to receive applications from the workmen and the staff to voluntarily retire on the ground that the 30 days time for making the applications as envisaged in the memorandum of understanding expired. Though Thiru Kamalarathnam has fixed the last date as 20th May, 1981, for receiving applications from employees to voluntarily retire, he extended the date to 9th June, 1981 Among the applicants there were persons below the age of even 50 years. In these circumstances, the management decided to retrench the surplus staff. The management further contended that W. P. No. 11168 of 1981 had been filed by some of the employees for identical reliefs. Ramanujam. J., took the view that once a settlement under section 12 (3) is entered into between the management and the workmen, it becomes a binding contract between the parties and if there is any breach of the settlement or the terms by any of the parties, the matter could not be agitated in proceedings under Article 226 of the Constitution of India to prevent a breach of contract by the parties or for specifically enforcing the contract.

12. On 22nd February, 1981, the petitioners have filed a supplemental affidavit to the effect that B & C Mills is an 'authority' within the meaning of Article 12 of the Constitution of India. The Management has filed a counter affidavit denying the stand of the petitioners that B & C Mills is an 'authority' within the meaning of Article 12 of the Constitution of India and is amenable to the jurisdicction of this Court under Article 226 of the Constitution of India.

13. Mr. N. G. R. Prasad, the learned counsel for the petitioners, raised the following contentions. (*i*) Under the terms of the memorandum of understanding dated 28th March, 1981, the appropriate manning strength for the mills has got to be determined by Thiru Kamalarathnam. It is only after the manning strength is determined, it would be possible to know the exact difference in the number of members of the staff as originally envisaged and the number of members who have to be declared surplus. Once that figure is arrived at it would be the duty of the management to extend to the surplus staff the opportunity to take advantage of the voluntary retirement scheme. The time-limit of 30 days as envisaged in clause (*iii*) of the memorandum of understanding cannot be applied before the manning strength is determined. The failure of the management to offer retirement benefit scheme to the members of the staff, who have become surplus by reason of the determination of the manning strength at 619, amounts to a breach of the settlement arrived at between the management and its workmen under section 12 (3) of the Act. It is the statutory duty of the second respondent — Commissioner of Labour, Madras, before whom section 12 (3) settlement was arrived at to see that the management implements the terms of the said settlement.

14. There is no doubt with regard to the interpretation of clause (*v*) of the memoran-

dum of understanding. In the circumstances, there is no need for referring any question of interpretation with regard to clause (*v*) for adjudication before the Industrial Tribunal, Madras. In any event, the first respondent—State Government must be deemed to have turned down the recommendation of the Commissioner of Labour for referring the question of interpretation of clause (*v*) of the memorandum of understanding for adjudication by the Industrial Tribunal, Madras. That being the case' if this Court comes to the conclusion that there is no ambiguity in clause (*v*) of the memorandum of understanding and the management have failed to act in terms of the said clause, it would be open to this Court to compel the Commissioner of Labour, the second respondent, to direct the management to implement the terms of the settlement and also to prohibit the management from retrenching the surplus staff in violation of the terms of the settlement. Assuming, without admitting, that no writ would issue against the second respondent for directing the management to implement the settlement, dated 6th June, 1981, and to prohibit them from retrenching the surplus staff, this Court could issue appropriate writ or direction in the nature of a writ directly to the management directing them to implement the settlement, dated 6th June, 1981, by offering voluntary retirement scheme to the surplus staff and by prohibiting them from retrenching them. In this context, the learned counsel further urged that B and C Mills is a public authority within the meaning of Article 12 of the Constitution of India. In any event, the learned counsel urged, a writ under Article 226 of the Constitution of India could be issued even against a private individual.

15. On the other hand, Mr. V. P. Raman, the learned counsel for the management urged that when once a settlement has been arrived at between the management and the workmen under section 12 (3) of the Act, the Commissioner of Labour has no further powers to compel the management to give effect to the terms of the settlement, even if it assumed for the sake of argument that the management had committed a breach thereof. Further, on the facts of the case on a representation made by the petitioners and the second respondent, Commissioner of Labour, had discussions with the petitioners and the management. The Commissioner of Labour came to the conclusion that there was a genuine difficulty in interpreting clause (*v*). Accordingly, the Commissioner recommended to the State Government to refer the question of interpretation of claues (*v*) of the settlement, dated 6th June, 1981, for adjudication by the Industrial Tribunal. The said question is still under the consideration of the Government The petitioners are not correct in saying that the Government have turned down the recommendations of the Commissioner for reference of the question for adjudication by the Industrial Tribunal. The writ petitions do not contain a prayer for the issue a writ of *mandamus* against the management. Even granting that this Court can mould the relief to be granted to the petitioners in an appropriate manner, this Court cannot issue a writ of *mandamus* to the management as it is not an authority within the meaning of Article 12 of the Constitution of India, as contended for by the learned counsel for the petitioners. Further, the management also would not be amenable to the jurisdiction of this Court under Article 226 of the Constitution of India, as it is not performing any public or statutory duty. The settlement entered into between the management and the workmen on 6th June, 1981, is purely contractual in character and consequently the petitioners cannot invoke the jurisdiction of this Court under Article 226 of the Constitution of India. The learned counsel also urged that the present writ petitions are barred by *res judicata* by the dismissal of W. P. No. 11168 of 1981 by Ramanujam, J. In any event, argued. Mr. Raman, even on the merits the petitioner's contentions cannot be sustained on the language of the memorandum of understanding.

16. The learned Government Advocate, Mr. S. Jagadeesan argued that the writ petitions are not maintainable. The petitioners filed a representation before the Commissioner of Labour. The Commissioner accordingly held discussions with the petitioners and the management and recommended to the Government that, in view of difficulty in interpreting clause (*v*) of the settlement, dated 6th June, 1981, the question should be referred for adjudication by the Industrial Tribunal. The Government have

not passed final orders on the petition. In fact, the petitioners themselves have invoked the jurisdiction of the Government under section 36-A of the Act for referring the question for adjudication by the Industrial Tribunal, Madras. Further, the Government have not taken a final decision on the matter. By the letter, dated 18th November, 1981, the Government have only requested the Commissioner of Labour to advise the management and workmen to resolve their various differences amicably. However, that does not mean that the Government have turned, down the recommendations of the Commissioner of Labour to refer the question for adjudication by the Industrial Tribunal.

17. Before considering the question whether a writ of *mandamus* as prayed for by the petitioners can be issued against the second respondent, Commissioner of Labour, it is necessary to consider the scope and nature of a writ of *mandamus*. A writ of *mandamus* is a command issued by a Court to a person holding a public office or against a corporation or inferior Court for the enforcement of duties which under the law for the time being in force are clearly incumbent upon such person or Court in his or its public character or corporation in its corporate character. In Halsbury's Laws of England, Third Edition, Volume 11, at page 84 it is stated thus:

> "The order of *mandamus* is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply, defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for reenforcing that right."

18. Prof. de Smith in his Judicial Review of Administrative Action, Fourth Edition, at page 540 states:

> "*Mandamus* lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The applicant must show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it. It is pre-eminently a discretionary remedy, and the court will decline to award it if another legal remedy is equally beneficial, convenient and effective."

The duty to be performed must be of a public nature.

> "To be enforceable by *mandamus* a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract".

19. Carner in his Administrative Law, Fourth Edition, at page 183 states thus:

> "This order is different in nature from prohibition and *certiorari*; it commands any person to whom it is directed to carry out a public duty imposed by law..... The duty which it is sought to enforce by order of *mandamus* must be of a public nature."

20. A writ of *mandamus* has been described thus in Corpus Juris Seeundum, Vol. 55, Page 15:

> "*Mandamus* have been broadly defined as a writ issuing from a court of competent jurisdiction, directed to a person, officer, corporation, or inferior court commanding the performance of a particular duty which results from the official station of the one to whom it is directed or from operation of law, or as a writ commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. It is a proceeding to compel someone to perform some duty which the law imposes on him and the writ may prohibit the doing of a thing. as well as command it to be done".

21. In *Sohan Lal* v. *Union of India*[1], it is observed as follows:—

1. 1957 S. C. J. 489 : 1957 S. C. R. 738 : (1957) 2 An. W. R. (S. C.) 50 : (1957) 2 M. L. J. (S. C.) 50 ; A. I. R. 1957 S. C. 529.

"Normally, a writ of *mandamus* does not issue to nor an order in the nature of *mandamus* is made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of public duty".

22. In *Praga Tools Corporation* v. *C. V. Imanual*[1] it is observed as follows:—

"Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of *habeas corpus*, *mandamus*, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a *mandamus* lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest.... Therefore, the condition precedent for the issue of *mandamus* is that there is one claiming it as a legal right to the performance of a legal duty by that one against whom it is sought. An order of *mandamus* is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body".

23. It is therefore clear that a writ of *mandamus* is an extraordinary remedy It is in form a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. So long as the duty that is sought to be performed is in the nature of a public duty, it is not necessary that the person or the authority on which the duty is imposed should be a public official or an official body. It is further necessary that the person claiming a writ of *mandamus* must have a legal right to the performance of a legal duty by the one against whom the writ is sought.

24. It is on the above principles that the question whether a writ of *mandamus* as prayed for by the petitioners can be issued against the second respondent, Commissioner of Labour, has to be considered. For deciding this question, we shall assume without deciding that the management has failed to implement one or the other terms of the settlement, dated 6th June, 1981. Under section 12 of the Act, the Conciliation Officer is enjoined to hold conciliation proceedings in the prescribed manner in cases where there is an industrial dispute between the management and the workmen or an industrial dispute is apprehended. Section 12 (2) casts a duty on the Conciliation Officer to investigate the dispute as early as possible and to do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. In cases, where as a result of the conciliation proceedings, a settlement of the dispute or any of the matters in dispute is arrived at between the management and the workmen, the Conciliation Officer is bound in terms of sub-section (3) of section 12 to send a report to the State Government together with a memorandum of settlement signed by the parties to the dispute The memorandum of settlement has to be entered into in accordance with rule 25 (2) o the Rules. Admittedly, in this case the settlement has been entered into by the management and the workmen under section 12(3) of the Act in the presence of the Commissioner of Labour and in accordance with the provisions contained in rule 25 of the rules. The Commissioner of Labour, while acting under section 12 as Conciliation Officer, is not invested with the power to adjudicate an industrial dispute. All that he can do is to try to persuade the parties to come to a fair and amicable settlement. In other words, his duties are only administrative and are purely incidental to industrial adjudication. Section 18(3) of the Act provides that a settlement arrived at in the course of the conciliation proceedings under the Act shall be binding not only on all parties to the industrial dispute, but in the case of an employer on his heirs, successors or assigns in respect of the establish-

1. (1970) 1 S. C. J. 91 : (1970) 1 Comp. L. J. 50: (1969) 1 S. C. C. 585 : (1970) 1 An. W. R. (S.C.) 29 : (1970) 1 M.L.J. (S. C.) 29 : (1969) 3 S. C. R. 773 ; A.I.R. 1969 S. C. 1306.

ment to which the dispute relates and in the case of workmen. all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part. Section 19 provides that a settlement shall come into operation on such date as is agreed upon by the parties to the dispute; Where no date is agreed upon, it shall come into force on the date on which the memorandum of settlement is signed by the parties. The settlement shall be binding for such period as is agreed upon by the parties. If no such period is agreed upon, it shall be binding for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party to the settlement. Section 29 makes punishable a breach of a binding settlement or award by any person. The person responsible for the breach shall be punishable with imprisonment for a term which may extend to six months or with fine or with both. Where the breach is a continuing one, the person committing the breach shall be liable to a further fine which may extend to Rs. 200 for every day during which the breach continues after the first oonviction. The section further empowers the Court to direct that the whole or any part of the fine realised from the person committing the breach to be paid by way of compensation to any person who has been injured by the breach. Section 34 provides that no Court shall take cognisance of any offence punishable under the Act or of the abetment of any such offence except by a complaint made by or under the authority of the appropriate Government. The offence shall be tried only by a Court which is not inferior to that of a Presidency Magistrate or a Magistrate of the first class. Section 39 (*b*) empowers the State Government to direct that any power exercisable by it under the Act or rules made thereunder shall, in relation to such matters and subject to such conditions, if any, as may be specified, be exercisable also by such officer or authority subordinate to the State Government as may be specified in a notification. In other words, it will be open to the State Government to delegate the power under section 39 to any other person. Apart ftom the above provisions, there is nothing either in the Act or in the rules conferring a power upon the Commissioner of Labour to implement the settlement arrived at between the parties under section 12 (3) of the Act. If any of the parties to the settlement is aggrieved by the non-implementation of the terms of settlement by the other party, then the remedy of the aggrieved party would be to move the Government for sanction to prosecute the party in breach under section 29 of the Act. Mr. N. G. R. Prasad has not been able to place his finger on any provision in the Act or the rules, under which, the Commissioner of Labour is under a statutory duty to seek the enforcement of a settlement entered into between the management and workmen under section 12 (3) of the Act Further, in this case, the Commissioner of Labour has done all that he could do within the powers conferred on him under the provisions of the Act. On receipt of a representation from the petitioners that the management is not giving effect to the terms of the memorandum of understanding, the Commissioner of Labour issued notice to the management. After hearing the management the Commissioner felt that there was real difficulty in interpreting clause (*v*) of the memorandum of understanding. In the circumstances, he sent a report to the Government recommending that the question of interpretation of clause (*v*) of the memorandum of understanding should be referred for adjudication by the Industrial Tribunal, Madras The Government, in their turn, have taken the categoric stand that no final orders have been passed on the recommendation of the Commissioner of Labour for reference of the question of interpretation of clause (*v*) of the memorandum of understanding to the Industrial Tribunal for adjudication. They have only sent an interim reply to the Commissioner that in view of the fact that there are several matters of difference between the management and the workmen the Commissioner of Labour should advise them to come to an amicable

settlement. It is therefore clear that the second respondent, the Commissioner of Labour has done whatever is possible for him within the four corners of the Act. In the circumstances, no writ of *mandamus* can be issued to the Commissioner of Labour directing him to take all measures to see that the third respondent implements clause (*v*) of the memorandum of understanding annexed to the settlement dated 6th June, 1981, or to prohibit the third respondent from laying off the staff.

25. Mr. N. G. R. Prasad then argued that even if we come to the conclusion that no writ of *mandamus* could issue against the Commissioner of Labour, this Court could issue such a writ against the management of the B & C Mills. According to the learned counsel, even though the specific prayer in these writ petitions is for the issue of a writ of *mandamus* the Commissioner of Labour, it would be open to this Court to mould relief according to the exigencics of the situation. To substantiate his argument that a writ could issue against the management of the B & C Mills, the learned counsel advanced two contentions : (1) B & C Mills would come within the category of 'other authority' under Article 12 of the Constitution of India. (2) Even if B & C Mills does not fall within the category of Article 12 of the Constitution of India, it would be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, as according to the learned counsel a writ under Article 226 of the Constitution of India can be issued even against a private person including an incorporated company.

26. We shall first take up the question whether B & C Mills is a State within the meaning of Article 12 of the Constitution of India. In *sukhdev Singh* v. *Bhagatram*[1], the Supreme Court held that the expression 'other authority' occurring in Article 12 of the Constitution of India was wide enough to include Corporations created by statutes and functioning within the territory of India or under the control of Government of India.

27. Mathew, J , approached the question on the basis that the concept of State had undergone drastic changes in recent years and that the State could no longer be conceived of simply as a coercive, machinery wielding the thunderbolt of authority. The learned Judge quoted Mac Iyer on 'The Modern State, Page 183 which is to the following effect : "If we clearly grasp the character of the State as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service". The learned Judge further observed that a State could only not through the instrumentality or agency of natural or juridical persons and that therefore there was nothing strange in the notion of the State acting through a corporation and make it an agency or instrumentality of the State. In this context, the learned Judge referred to the decision of the Supreme Court of the United States in *Mc. Culloch* v. *Maryland*[1], wherein it has been held that the Congress has power to charter corporations as incidental to or in aid of Govermental functions. The learned Judge then referred to the public corporations established by Parliament in Great Britain which had become a third arm of the Government and also to the 'enterprise publique' in France. The learned Judge then posed the question whether an act of privately owned and managed agency receiving direct financial aid from the State could be characterised as state action. The learned Judge answered the question thus : "It may be stated generally that State financial aid alone does not render the institution receiving such aid a state agency. Financial aid plus some additional factor might lead to a different conclusion. A mere finding of state control also is not determinative of the question, since a State has considerable measure of control under its police power over all types of business operations. It is not possible to assume that the panoply of law and authority of a state under which people carry on ordinary business, or their private affairs or own property, each enjoying equality in terms of legal capacity would be extraordinary assistance. A finding of state financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as state action." Another factor

1. (1975) 1 S. C. C. 421 : (1975) 3 S. C. R. 619: A. I. R. 1975 S. C. 1331.

1. (1819) 4 Wheat 316.

which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of much public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion." . . It has taken English and American Courts many years to concede that the exercise of an industrial or commercial activity on behalf of the State does not deprive such activity of its governmental character. But a great many anomalies in Common Law remain, in particular as regards the immunities and privileges of the Crown in such matters, immunity from the binding force of status, debt priority, freedom from taxes and other public charges. The recent English cases appear, at long last, to move towards the abandonment of the totally antiquated notions of proper functions of government. In this connection, the learned Judge cited the decision in *Pfizer* v. *Ministry of Health*[1], and the observations of Wilmer, L. J. to the effect : "in mid-Victorian time the treatment of patients in hospitals would have been regarded at something quite foreign to the functions of Government, but since then there had been a revolution in political thought and a totally different conception prevails today as to what is and what is not within the functions of government", The learned Judge quoted the following observation of Douglas, J. in *New York* v. *United States*[2]. A State's project is as much a legitimate governmental activity, whether it is traditional, or akin to private enterprise, or conducted for profit, *Helvering* v. *Gorhart*[3]. A State may deem it as essential to its economy that it own and operate a rail road, a mail, or an irrigation system as it does to own and operate bridges, street lights or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension

1. (1964) 1 Ch. 614.
2. (1945) 326 U. S. 572.
3. (1937) 304 U. S. 405, 426, 427.

of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina* v. *United States*[1], any activity in which a State engages within the limits of its police power is a legitimate governmental activity." To quote the learned Judge again: "Institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the function formed, government agencies. Activities which are too fundamental to the society are by definition too important not to be conside red government function".

28. The doctrine of agency formulated by Mathew, J. in *Sukhev Singh* v. *Bhagatram*[2], has been adopted by the Supreme Court in the following decisions viz. (1) *H. D. Shetty* v. *The International Airport Authority of India*[3]; (2) *Som Prakash Rekhi* v. *Union of India*[4]; and (3) *Ajay Hasia* v. *Khalid Mujib Sehravvardi*[5]. In these cases, the Supreme Court held that corporation. statutory or incorporated, would fall within the meaning of Article 12 of the Constitution of India provided they are agencies or instrumentalities of the Government. It is enough to refer to the following tests as summaried by *Ajay Hasia* v. *Khalid Mujib Sehravardi*[5], to find out whether a corporation is an agency or instrumentality of the Government:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

1. (1905) 199 U S. 437.
2. (1975) 1 S. C. C. 421 : (1975) 3 S. C. R. 619.
3. (1979) II L. L. J. 217.
4. (1981) 1 L L. J. 79 : (1981) 1 S. C. J. 458 : 52 Comp Cases. 71 : 57 F. J. R. 370 : (1981) 1 *S.* C. C. 449 : (1981) 2 *S.* C. R. 111 : A. I. R. 1981 S. C. 212.
5. (1981) I L. L. J. 103.

(3) It may also be a relevant factor... whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference of the corporation being an instrumentality or agency of Government."

29. It is equally necessary to refer to the following observations of Chinnappa Reddy, J. in *Managing Director* v. *Vijay Narayan Vaipayee*[1] relied upon by Mr. Prasad:

"I find it very hard indeed to discover any distinction on principle between a person directly under the employment of the Government and a person under the employment of an agency or instrumentality of the Government or a corporation, set up under a statute or incorporated but wholly owned by the Government."

30. It is but apposite to refer to certain observations of Krishna Iyer, J. in *Som Prakash Rekhi* v. *Union of India*[2], (Bharat Petroleum Case).

"For purposes of the Companies Act, 1956 a Government company has a distinct personality which cannot be confused with the State. Likewise, a statutory corporation constituted to carry on a commercial or other activity is for many purposes a distinct juristic entity not drowned in the sea of State, although, in substance, its existence may be but a projection of the State. What we wish to emphasise is that merely because a company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we should not mean the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Article 12 that any authority controlled by the Government of India is itself State. Law has many dimensions and fundamental facts must govern the applicability of fundamental rights in a given situation. ...Sometimes the test is formulated, in over-simplified fashion, by asking whether the corporation is formed by a statute or under a statute. The true test is functional. Not how the legal person is born but way it is created. Nay more. A part from discharging functions or doing business as the proxy of the State, wearing the corporate mask there must be an element of ability to effect legal relations by virtue of power vested in it by law ..."

1. (1980) I L. L. J. 222.
2. (1981) 1 S. C. J. 458 : 57 F. J. R. 370 : (1981) 2 S. C. R. 111 : (1981) 1 L. L. J. 79.

The learned Judge after referring to certain passages in *Sukdev's* v. *case*[1], observed.

There is nothing in these observations to confine the concept of State to statutory corporations. Nay, the tests are common to any agency or instrumentality, the key factor being the brooding presence of the State behind the operations of the body, statutory or other.

A study of *Sukdhev's case*[1], yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are financial resources, of the State being the chief funding source, functional character being governmental in essence, plenary control residing in Government, prior history of the same activity having been carried on by Government and made over to the new body and some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from.........

1. (1975) 1 S.C.C. 421.

under a statute, is not an important criterion although it may be an indication. Applying the concatenation of criteria collected by us from *Airport Authority case*, on a cumulative basis, to the given case, there is enough material to hold that the Bharat Petroleum Corporation is 'State' within the enlarged meaning of Article 12."

31. It is in the light of the above tests laid down by the Supreme Court we have to consider the question whether B. & C. Mills is an agency or instrumentality of the Government. The only ground on which the learned counsel sought to bring the B. & C. Mills within the meaning of 'other authority' under Article 12 of the Constitution of India is that the Government owned 40% of the shares and that statutory corporations like the Life Insurance Corporation of India have advanced large amounts to the Company. From this fact alone we are not in a position to come to the conclusion that B. & C. Mills is an authority within the meaning of Article 12 of the Constitution of India. The learned counsel has not been able to convince us that B. & C. Mills is an instrumentality or agency of the Government and that it satisfies any of the tests laid down by the Supreme Court in the Airport Authority case and subsequent cases. There is absolutely no plenary control of the mills by the Government. The mills are not owned fully by the Government. The mills cannot affect legal relations by virtue of any power vested in it by any law. We have therefore no hesitation in rejecting the contention of the learned counsel for the petitioners that B. & C. mills must he held to be an instrumentality or agency of the Government and consequently is 'other authority' within the meaning of Article 12 of the Constitution of India.

32. We shall now take up for consideration the argument of Mr. Prasad that B. & C. Mills would be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, as according to the learned Counsel a writ under Article 226 of the Constitution of India can be issued even against a private person including an incorporated company. The scope of Article 226 of the Constitution of India came up for consideration before this Court as early as in 1950 in In re *Gadda Nagabhushana Reddi and another*[1]. There, a writ of prohibition was asked for against the election sub-committee of the All India Congress Committee and other committees. Emphasis was laid on the words 'to any person or authority' and 'for the enforcement of any of the rights conferred by part III and for any other purpose', found in Article 226 of the Constitution of India and it was urged before this Court that a writ would lie against a private individual. It was further argued that Article 226 was not confined to the issue of recognised writs like *mandamus*, prohibition or *certiorari*, but would include other writs and orders and directions without any restriction whatsoever as to their scope. Rajamannar, CJ, observed as follows:

"The application in question purports to be for the issue of a writ of prohibition. Ordinarily, this writ is available only against inferior Courts and Tribunals and bodies entrusted by the law of the land with powers to affect the rights of parties. No case has been brought to our notice in which this writ has been issued to a private organisation however widespread and powerful it may be. Mr. Pattabhiraman stated that the respondents against whom the writ was sought were officers of the Congress Party. We do not think that the Congress Party could be held in law to be a public body. It may be a very powerful, if not the most powerful, political party in the land and the members of the Governments of the various States are persons belonging to that party. Nevertheless in law, it cannot be held to be a public body entrusted by the law of the land with powers and duties relating to the rights of the people."

In this view, the learned Judges dismissed the writ petition as not maintainable. This decision has been followed by various High Courts in India.

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1. (1950) 2 M. L. J. 278 : 63 L. W. 781 : I. L. R. (1950) Mad. 1119 : A. I. R. 1951 Mad. 249.

33. In In re *Thippaswami*[1], Rajamannar, CJ, speaking for the Court observed thus:

"Article 226 should not be construed so as to replace the ordinary remedies available to the litigant under the general law of the land. Direction in the nature of a writ of *mandamus* should not issue under this Article except to a public or a quasi-public body or officer which is under an obligation, statutory or otherwise, to do or refrain from doing anything which is likely to interfere with the rights of persons."

34. Again, Rajamannar, CJ., had occasion to deal with the scope of Article 226, particularly with reference to the issue of a writ of *mandamus* in *L. T. Corporation* v. *State of Madras*[2]. The learned Chief Justice spoke thus:

"It was next contended by Mr. Sankara Aiyar that the language of Article 226 of the Constitution was wide enough to apply to cases which would not fall within the scope of a prerogative right of *mandamus* as understood in England. He even went to the length of saying that Article 226 would apply to disputes between private persons. Stress was laid on the words 'any person' and 'for any other purpose'. We do not agree. It is undoubtedly true that the extent of the power conferred on the High Courts under Article 226 is much larger than they ever possessed before. But we have no hesitation in holding that it is not an unlimited power. In our opinion the words 'to any person' means "to any person to whom according to well-established principles writs like those mentioned in the article would lie": and the words "any other purpose" must be read in the context in antithesis to the words "for the enforcement of any of the rights conferred by Part III." Obviously, writs like '*habeas corpus*', *mandamus* and *certiorari* could be issued not only for the enforcement of any of the fundamental rights, but also for the enforcement of other legal rights, subject however to conditions well-established. To give an instance, the writ of prohibition has always been understood as a writ which could issue only to a judicial or quasi-judicial tribunal or an inferior Court. Surely, it cannot be said that now under Article 226 a writ in the nature of prohibition could issue even to a private person prohibiting him from doing some act which is likely to injure an applicant."

1. (1951) 2 M. L. J. 171 : 64 L. W. 665 : A. I. R. 1952 Mad. 112.
2. (1954) 1 M. L. J. 429 : I. L. R. (1954) Mad. 754 : A. I. R 1954 Mad. 549.

35. The learned Chief Justice referred to the following observations of Mitter, J. in *Gariabad Mineral Water Manufacturing Co. Ltd.* v. *H. M. Jagtiani*[1].

"At first sight it would appear that the language used in Article 226 imposes no limits whatsoever as to the category of persons to whom, and the purpose for which, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them may be issued by the High Court. But once the origin and history of the high prerogative writs are remembered, it is clear that the powers given to a High Court under Article 226 are to be exercised in accordance with the principles which governed the said writs. The power of the High Court to issue such a writ 'to any person' can only mean the power to issue such a writ to any person to whom according to well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words for 'and for any purpose' must mean' for any other purpose for which any of the writs mentioned would, according to well-established principles issue."

The learned Chief Justice has also referred to the following observations of the Full Bench of the Allahabad High Court in *India Sugar Mills Association* v. *Secretary to Government, Uttar Pradesh Labour Department*[2].

1. A. I. R. 1952 Cal. 315 at page 318.
2. (1950) All. L. J. 767 : I.L.R. (1952) 1 All. 186 A. I. R. 1951 All 1 at p. 3 (F. B.).

"We feel that the time has come when we may point out that Article 226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual Courts established by law."

Regarding the circumstances in which a writ of *mandamus* could be issued the learned Chief Justice has held thus:

"A writ of *mandamus* cannot be granted for enforcement of contractual obligations, for which there is remedy by an action at law in the ordinary course. The writ is only granted to compel the performance of duties of a public nature. It will not accordingly issue for a private purpose, that is to say, for the enforcement of a mere private right".

36. The question that came up for consideration before a Bench of this Court in *United India Fire and General Insurance Company Limited* v. *A. A. Nathan*[1], was whether the United India Fire and General Insurance Company Limited, was amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. Ismail, CJ., speaking for the Bench held that the United India Fire and General Insurance Company Limited is not as 'authority' within the meaning of Article 12 of the Constitution of India. The learned Chief Justice then, noticing the fact that the terms of Article 226 of the Constitution of India are wide, proceeded to consider whether the United India Fire and General Insurance Company Limited would be amenable to the jurisdiction of Article 226 of the Constitution of India. The learned Chief Justice observed as follows:—

"This Article (226) uses the expression any person or authority, including in appropriate cases any Government'. Decided cases have held that the authority must be of a public character, because the Article is not intended to replace the ordinary or general remedy available to a citizen to approach a civil Court by instituting a a suit. Hence with reference to Article 226 the only consideration will be whether the appellant company can be said to be a public authority or not. Having regard to what we have pointed out above, with regard to the rights, privileges and duties of the company, in the light of the provisions contained in Central Act LVII of 1972, we have no hesitation whatever in holding that the company will come within the scope of Article 226 of the Constitution of India and will, therefore, be amenable to the writ jurisdiction of the High Court."

1. (1980) Lab. I. C. 1076 : (1980) 1 L. L. J. 369.

From the above, the principle that emerges is that the scope and amplitude of Article 226 are wide. A person or authority to be amenable to the jurisdiction of the High Court under Article 226 need not fall under the category of 'other' authority' within the meaning of Article 12 of the Constitution. The person referred to in Article 226 must be a person to whom a writ will lie according to the well established principles depending upon the nature of the writ sought for. As pointed out by Rajamannar, CJ , in *L. T. Corporation* v. *State of Madras*[1], and by Ismail, CJ., in *United India Fire and General Insurance Company Limited* v. *A. A. Nathan*[2], to hold that 'person' referred to in Article 226 of the Constitution, would refer to any private individual or an incorporated company, irrespective of the question whether any one of the writs referred to in Article 226 would lie against them according to the established principles, would mean that section 9 of the Civil Procedure Code would be supplanted by Article 226 and it would be open to every citizen to approach the High Court under Article 226 of the Constitution for the redressal of his griveance.

37. The learned counsel for the petitioners heavily leaned on the decision of Chowdhary, J. of the Andhra Pradesh High Court in *P. Gattaiah* v. *Commissioner of Labour*[3]. The judgment of the learned Judge cannot be understood in the sense that the learned Judge has held that in all cases a writ would lie against a private individual or an incorporated company On the other hand, the learned Judge has observed in paragraph 20 that in *appropriate cases* (Italics supplied) a writ under Article 226

1. (1954) I M. L. J. 429 : A. I. R. 1954 Mad. 549
2. (1981) Lab. I. C. 1076 : (1980) 1 L. L. J. 369.
3. (1981) 2 L. L. J. 54 : (1981) 1 An. W. R. 259 ; (1981) Lab. I. C. 942.

of the Constitution would issue even against a private person. A perusal of the entire judgment would show that a *mandamus* would issue against a private individual or an incorporated company provided the private individual or the company is enjoined by law to perform a duty of a public nature. If the learned Judge has meant that a writ could be issued against a private person or an incorporated company even for the purpose of enforcing a contractual right or any other private right without reference to the question whether the writ that is sought for would lie against that private individual or company under the well-established principles, then we must confess, with great respect to the learned Judge, that we are unable to subscribe to that view and we see no justification for holding that the person referred to in Article 226 would take in every private individual, with respect to every private act or omission of his.

38. On the facts of this case, we are of the view that B. & C. Mills is not amenable to the jurisdiction of this Court under Article 226 of the Constitution of India for the issue of a writ of *mandamus*. We have already referred to the circumstances in which and the persons against whom, a writ of *mandamus* should issue need not be a public or official body. A writ of *mandamus* could only be issued for the performance of an act which is in the nature of a public duty. We are not persuaded to accept the argument of Mr. Prasad that there is a public duty cast on the B. & C. Mills to fulfil the terms of the settlement entered into by it with the workmen under section 12 (3) of the Act. The implementation of the settlement entered into by the B. & C. Mills with its workmen cannot be called a duty which is in the nature of a public duty. The obligation arising under the settlement is purely contractual and a writ of *mandamus* cannot issue for the enforcement of a contractual right. It is not necessary to cite any precedent so far as this proposition is concerned. The two Life Insurance Corporation cases cited by the learned counsel viz., ***M. M. Pathak* v. *Union of India***[1] and ***L. I. C.* v. *D. J. Bhadur***[2], are of no assistance to him as in those cases writs of *mandamus* were issued to the Life Insurance Corporation of India as it was as authority within the meaning of Article 12 of the Constitution of India and therefore amenable to the writ jurisdiction, The other decisions cited by the learned counsel also do not apply to the facts of this case. Hence, we reject this argument also of Mr. Prasad.

39. In the result, the writ petitions are dismissed. However, there will be no order as to costs.

R. S. —— *Petitions dismissed.*

1. (1978) Lab. I. C. 613 : (1978) 1 L. L. J. 406.
2. (1981) 1 L. L. J. 1 : (1980) Lab. I. C. 1218 : A. I. R. 1980 S. C. 2181.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

M. R. S. Ramakrishnan ... *Petitioner**

v.

The Assistant Director of Ex-Servicemen Welfare (District Soldiers, Sailors and Airmen Board), Tiruchirapalli and others ... *Respondents.*

(A) *Transfer of Property Act (IV of 1882), section 108 (9)—Lease of building by Collector for a fixed period—Expiry of the said period—Property leased out in public auction— Original lessee not delivering possession—Right of lessor does not extend to taking possession by force—Position not different even in the case of tenancy under Government—Lessor's right of re-entry—Premises sealed with the help of policeman by use of force—Distinction between English Law and Indian Law pointed out.*

(B) *Specific Relief Act (XLVII of 1963), section 9—Right of tenant to get back possession in case of forcible eviction.*

The premises in question was originally leased out to the petitioner in the year 1974 and the petitioner continued to be in possession of the said premises as a lessee till 9th October, 1981. The respondent required the

*W. P. No. 9827 of 1981. *26th February, 1982.*

petitioner to vacate and deliver vacant possession of the premises within two months from the receipt of the notice on the expiry of the lease period The petitioner asked for a renewal of the lease in view of the heavy investment made by him on the property. However the lessor was not willing to renew the lease but held an auction for lease of the said property. A writ of *mandamus* to prevent the auction taking place was filed, But later on it was withdrawn. The petitioner continued in possession even after the auction The respondents were alleged to have acted in an arbitrary and high-handed manner and sealed the premises with the help of the police by use of force and threat. At this stage the petitioner filed the present writ petition stating that the respondents had no power to take forcible possession.

Held, that section 108, clause (*q*) of the Transfer of Property Act imposes a liability on the lessee to put the lessor into possession of the property on the determination of the lease. Such liability arises whether the lease is terminated by notice or by efflux of time. The question is if the lessee failed to restore vacant possession in breach of the obligation referred to in clause (*q*) of the section what remedies are available to the lessor and whether those remedies include a right to re-enter the property by force without the tenant surrendering possession of the property voluntarily. On the question of the lessor's right of re-entry there is a difference between English Law and Indian Law. While the English law recognises the right of the lessor to take forcible possession against the will of the lessee in certain circumstances, the Indian Law does not recognise such right of re-entry without due process of law. [*Para.* 6.]

The preponderance of judicial opinion is that the tenant in possession of leasehold property after the termination of the lease cannot be dispossessed by force except under due authority of law and the position is not different in the case of a tenancy under the Government. Even if forcible possession has been taken by the Government as a quandom lessor the quandom tenant is entitled to get back possession of the property under section 9 of the Specific Relief Act. If on the date of filing the petition the petitioner has been thrown out of the premises even by force he cannot seek restoration of possession in these proceedings by getting a writ of *mandamus* and his remedy is only to claim damages or other reliefs in other appropriate forums. But if on the date of filling of the writ petition he was in possession of the premises either physically or constructively he is entitled to seek the Court's protection. [*Para.* 11.] [*Para.* 5.]

Cases referred to:—

K. K. Vermu v. *Union of India*, A. I. R. 1954 Bom. 358 ; *Patiala State* v. *Mohinder Singh*, A. I. R. 1958 Punj. 325 ; *Lallu Yeshwant Singh* v. *Rao Jagadish Singh*, (1968) 2 S. C. J. 244 : (1968) 2 S. C. R. 203 : (1968) 1 S. C. W. R. 307 : A. I. R. 1968 S. C. 620 ; *Yar Mohamad* v. *Lakshmi Das*, I. L. R. (1958) 2 All. 394 ; *Midnapur Zamindary Company Ltd.* v. *Narash Narayan Roy*, (1924) 51 I A. 293 : 47 M. L. J. 23: 20 L. W. 770 : A. I. R. 1924 P. C. 144 ; *Badrilal* v. *Indore Municipality*, (1973) 2 S. C. C. 388 : (1973) 3 S. C. R. 15 : A. I. R. 1973 S. C. 508; *M/s. Chandra & Co* v. *State*, A. I. R. 1981 Raj. 217 ; *The Neyveli Lignite Corporation Ltd.*, v. *S. Narayana Iyer*, I. L. R. (1964) 1 Mad. 676 : 77 L. W. 387 : A. I. R. 1966 Mad. 122.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* calling for the records of the respondents relating to the lease of the Jawan Bhavan, Tiruchirapalli restraining the respondents from taking possession of the property bearing Door. No. 17 comprising of Building site and lawn, Door No. 16. Door Nos. 21 to 33 being lodging rooms and Door Nos. 35-A and 35-B being Office halls situate in Williams Road, Tiruchirapalli Junction, Tiruchirapalli Municipal Town from the petitioner.

Arunagirinathan, for *Raj & Raj*, for Petitioner.

N. R. Chandran, Additional Government Pleader No. 11, for Respondents.

The Court delivered the following

JUDGMENT The petitioner herein seeks a writ of *mandamus* from this Court restrain-

ing the respondents from taking possession of premises No. 17 in Williams Road, Tiruchirapalli except in accordance with law.

2. The circumstances under which the above prayer has been made may briefly be stated : The said property belonged to the third respondent and the administration and management of the property is vested in the second respondent and the income therefrom is spent for the welfare of the Ex-Servicemen. The said premises had been originally leased out to the petitioner in the year 1974 and the petitioner continued to be in possession of the said premises as a lessee till 9th October, 1981. By a notice, dated 8th August, 1981, the respondents requested the petitioner to vacate and deliver vacant possession of the premises within two months from the date of receipt of the notice on the expiry of the lease period on 9th October, 1981. The petitioner sent a reply stating that the lease may be renewed in view of the heavy investment made by him on the property. By a letter, dated 16th September, 1981 the petitioner prayed for the renewal of the lease offering to pay 15% more than the original rent of Rs. 5,158 per month. However, the second respondent was not willing to renew the lease but published a notice stating that an auction will be held on 6th October, 1981 for lease of the said property for the period from 10th October, 1981 to 9th October, 1983.

3. At that stage, the petitioner filed a writ petition, W. P. No. 9736 of 1981 for the issue of a writ of *mandamus* to prevent the auction from taking place. However, the petitioner later withdrew the same. The petitioner continued to be in possession even after 9th October, 1981. At the auction which was held on 6th October, 1981 the highest bid was for a monthly rent of Rs. 20,360 for a period of two years from 10th October, 1981 to 9th October, 1983, which is nearly four times the rent the petitioner has been paying for the same premises. As per the conditions of the auction sale held on 6th October, 1981, possession of the building has to be handed over to the new lessee on 10th October, 1981, and as such a notice, dated 6th October, 1981, asking the petitioner to vacate the premises and deliver vacant possession of the same was affixed on the outer door of Kanchana Hotel as the petitioner was absent. The petitioner, however, did not hand over possession of the premises as called upon in the notice, dated 6th October, 1981. On 10th October, 1981, the respondents are said to have acted in an arbitrary and high-handed manner in sealing the premises with the help of policemen by use of force and threat. It is at this stage the petitioner has come forward with the present writ petition stating that the respondents have no power to take forcible possession of the premises except under due process of law and that the sealing of the premises with the help of the police when articles worth about five lakhs of rupees are still in the premises and the conduct of the respondents in attempting to take forcible possession of the property is illegal. According to the petitioner the respondents by use of brutal force with the help of police had smashed the name boards, broke open the petitioner's locks and placed seals on the door of the premises when the petitioner has not removed his articles and vacated the premises. The said action of the respondents, according to the petitioner, is without authority of law. The petitioner's case is that even assuming that his possession after the the expiry of the lease is not legal, the respondent cannot take forcible possession without recourse to law and that their action is violative of the principles of natural justice and therefore, the respondents should be restrained by the issue of a writ of *mandamus* from taking possession of the property by force without due process of law.

4. In the counter-affidavit the respondents did not dispute the fact that the petitioner continued in possession of the premises until 9th October, 1981, as a lessee. However, they would contend that under the terms of lease executed by him on 27th May, 1980 he is bound to vacate the building and deliver vacant possession of the same on or before 9th October, 1981, that though as per the terms of the lease no notice of termination of tenancy is necessary, with a view to avoid inconvenience to the petitioner and to facilitate him to make alternative arrangements, a registered notice was sent to the petitioner even on 10th August, 1981, in answer to which the petitioner came forward with a request for renewal of the lease for five more years though he is not entitled to claim renewal as per the terms of the lease deed.

According to the respondents, on the expiry of the tenure of the lease on 9th October, 1981, the petitioner should have handed over possession of the premises especially when his request for extension of the lease was not accepted by the respondents. Since the petitioner did not vacate the premises on 10th October, 1981, though he had removed all the things belonging to him except a water cooler, a refrigerator with motor and certain minor items such as bulbs, shades, etc. after the expiry of the petitioner's lease on 9th October, 1981, the first respondent has taken possession of the premises on the morning of 10th October, 1981, and, therefore, there is no question of the issue of any writ of *mandamus* by this Court restraining the respondents from taking possession of the premises forcibly or otherwise. Thus the first thing to be considered is whether possession has already been taken by the respondents alleged by them or whether the petitioner continues to be in possession on the date of the filing of the writ petition for *mandamus.*

5. In the counter-affidavit filed by the respondents on 17th October, 1981, in W. P. No. 13288 of 1981 which has been filed by the petitioner for a temporary injunction it has been stated by the first respondent in the writ petition that even after the affixture of a notice, dated 6th October, 1981, on the outer door of Kanchana Hotel 'the petitioner failed to hand over possession of the same and was wantonly evading though he has removed major portions of the articles kept in the premises'. As such, the first respondent has taken possession of the premises on the morning of 10th October, 1981. On the night of 9th October, 1981, the petitioner himself has removed all the things that belong to him, except a water cooler, a refrigerator with motor and certain minor items, such as bulbs, shades etc... After removing his things which includes all his furniture, tables, chairs and cooking utensils he has locked the main hall and lodging rooms and went away. In spite of the notice asking him to be present, he was not present on 10th October, 1981, and therefore, the possession of the premises was taken over and inventories were taken in the presence of two independent witnesses and in the presence of the Revenue Divisional Officer, Tiruchirapalli, the Deputy Superintendent of Police and the Tahsildar, Tiruchirapalli." Thus the respondents have admitted that the petitioner had not completely vacated the premises, as admittedly some of his articles are still in the premises and the premises was found locked when they went to take charge of the premises along with police and revenue officials. It is said that so long as the petitioner has not completely vacated the premises voluntarily and so long as some of his articles continued to be in the premises it cannot be said that the petitioner has been dispossessed on the date of the filing of the writ petition so as to say that this Court has no power to issue a *mandamus* sought for by the petitioner. It is no doubt true, if on the date of the filing of the petition the petitioner has been thrown out of the premises even by force then the petitioner cannot seek restoration of possession in these proceedings by getting a writ of *mandamus* as prayed for by him and his remedy is only to claim damages or other reliefs in other appropriate forums. By if on the date of the filing of the petition he is in possession, either physical or constructive, he is entitled to seek the protection of this Court. In the counter-affidavit, since it has been admitted that the petitioner did not vacate the premises though he has removed major portion of his articles except a water cooler, a refrigerator with motor and certain other minor items such as bulb shades etc. and had locked the premises and went away, the should be taken to have been in possession of the property, and merely because the first respondent has sealed the premises with the help of police and Revenue Officials it will not mean that the petitioner has been completely dispossessed. Thereore, the question now is whether the respondent could take forcible possession of the premises from the petitioner even assuming that his possession of the premises is not lawful.

6. Section 108 of the Transfer of Property Act sets out the rights and liabilities of lessor and lessee. Clause (*q*) of that section imposes a liability on the lessee to put the lessor into possession of the property on the determination of the lease. Such liability arises whether the lease is terminated by notice or by efflux of time. The question is, if the lessee failed to restore vacant possession in breach of the obligation referred to in clause (*q*) of the Act, what are the remedies available to the lessor and whether those

remedies include a right to re-enter the property by force without the tenant surrendering possession of the property voluntarily? On the question of lessor's right of re-entry, there is difference between English Law and Indian Law. While English Law recognises the right of the lessor to take forcible possession against the will of the lessee in certain circumstances, the Indian Law does not recognise such right of re-entry without due process of law. This distinction has been pointed out in *K. K. Verma* v. *Union of India*[1]. In that case also, there was a tenancy of Government premises which stood terminated by a valid notice to quit. On the tenant failing to hand over possession as required under section 108 (*q*) the question was whether the Government could take forcible possession of the premises in those circumstances. The Court observed that the law in India is essentially different from English Law which treats the quandom lessee who was in possession after the termination of lease as the trespasser, which is not the position in Indian Law, that under the Indian Law, the possession of a tenant who has ceased to be a tenant is protected by law that although he may not have a right to continue in possession after the termination of the tenancy, his continued possession is juridical which is protected by statute and that under section 9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law. It has been clearly laid down in that case that the Indian Law makes a clear and sharp distinction between a trespasser and an erstwhile tenant, that whereas the trespasser's possession is never juridical and never protected by law the possession of an erstwhile tenant is juridical and is protected by law, that therefore, as far as the Indian Law is concerned, an erstwhile tenant can never become a trespasser and the lessor deprive the erstwhile tenant of his possession of the leasehold premises by force, but he can only eject his erstwhile tenant by recourse to law by obtaining a decree for ejectment.

7. *Patiala State* v. *Mohinder Singh*[2], was also a case where the tenancy was under the Government and after the termination of the lease, the Government took forcible possession and a suit was filed by the quandom lessee under section 9 of the Specific Relief Act. In those circumstances, the Court held that the general position in law is that regardless of the question of title or the right to possession of the property, the party actually in peaceful and quiet possession shall not be turned out by strong hand, violence or terror, that there is no provision of law which empowers a State Government by force or show of force to evict a person who is in actual possession of property, and that if the State Government were of the opinion that the State had the better right to possession, it is open to them to bring an appropriate action against him and to secure eviction in accordance with the provisions of law.

1. A. I. R. 1954 Bom. 358.
2. A. I. R. 1958 Punj. 325.

8. In *Lallu Yeshwant Singh* v. *Rao Jagadish Singh*[1] the Supreme Court has laid down in more or less similar circumstances that where a tenant was forcibly evicted from the leasehold premises and the tenant had filed a suit under section 9 of the Act it is well-settled that the question of title is irrelevant in a suit under that section, that although the tenant may not have a right to continue in possession after the termination of the tenancy, his possession is protected by that section and that the general principle of law is that no act can be done by the strength of one's own hands but help of the law should be taken. In *Yar Mohamad* v. *Lakshmi Das*[2], the Full Bench of the Allahabad High Court in dealing with the scope of section 9 of the Specific Relief Act has observed:

> "No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under section 9 of the Specific Relief Act). The plaintiff will be entitled to succeed without proving any title on which he can fall back upon and defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title

1. (1968) S. C. W. R. 307 : ((1968) 2 S. C. J. 244: (1965) 2 S. C. R. 203 : A. I. R. 1968 S. C. 620.
2. I. L. R. (1958) 2 All. 394.

cannot, therefore, be prejudiced any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession ......Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No person can be allowed to become a Judge in his own cause."

9. The following observation of the Privy Council in *Midnapur Zamindary Company Limited* v. *Narash Narayan Roy*[1], is pertinent in this connection :

"In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."

10. In *Badrilal* v. *Indore Municipality*[2], it has been laid down that the person who is in lawful occupation of the premises does not become a trespasser and if he does not become a tenant holding over, he would be a tenant by sufferance. In *M/s. Chandra & Co.* v. *State*[3], in more or less similar circumstances as in this case it was held that the State is not free to act in a high-handed manner as to dispossess a person in juridical possession, of a property otherwise than in due course of law, that a person who is in peaceful possession of property cannot be deprived of the possession of the same by the State or its officers, except in accordance with law, that in a case where the State or its officers have dispossessed such a person of the property in his possession without any authority of law, it is open to him to seek redress against the aforesaid unlawful action of the State and its officers by invoking the jurisdiction of the High Court under Article 226 of the Constitution and that the State as owner of property does not enjoy any higher rights than the citizen in the matter of taking possession of its property.

1. (1924) 51 I. A. 293 at 299 : 20 L. W. 770 : 47 M. L. J. 23 : A I.R. 1924 P. C. 144
2. (1973) 2 S. C. C. 388 : (1973) 3 S. C. R. 15 : A. I. R. 1973 S. C. 508.
3. A. I. R. 1981 Raj. 217.

11. Thus, the preponderance of the judicial opinion is that the tenant in possession of the leasehold property after the termination of the lease cannot be dispossessed by force except under due authority of law and the position is not different in the case of a tenancy under the Government; that even if forcible possession had been taken by the Government as a quandom, lessor, the quandom tenant is entitled to get back possession of the property under section 9 of the Specific Relief Act.

12. The learned Government Pleader appearing for the respondent would rely on a decision of a Division Bench of this Court in *The Neyveli Lignite Corporation Ltd., Neyveli* v. *K. S. Narayana Iyer*[1]. I do not see how the said judgment will apply to the facts of this case. In that case, a person who had already been dispossessed filed a suit under section 9 of the Specific Relief Act to recover possession and it was found that the tenant did not insist upon restoration of possession in his notice prior to suit, that he himself voluntarily removed all his movables at the request of the lessor and that therefore, he is not entitled to seek possession under section 9 of the Specific Relief Act. The ultimate decision in that case was based on the fact that the tenant did not resist possession being taken by the lessor and the tenant vacated without resistance at the request of the lessor and therefore, he is not entitled to invoke section 9 of the Specific Relief Act. The ultimate decision in that case is not applicable to the facts of this case where the tenant has been found to be in possession at the time he seeks the aid of the Court as admittedly. some of the articles are still found inside the premises though the premises had been sealed from outside by the respondents with the help of the police. The said decision far from helping the respondents, in fact supports the legal submission made by the petitioner's counsel. In that case, the Bench has clearly observed that the landlord in India, even if the lease had expired, will not be entitled to dispossess his tenant except by due process of law, that the principles of English law

1. I. L. R. (1964) 1 Mad. 676 : 77 L. W. 387 : A. I. R. 1965 Mad. 122.

that a tenant whose term of lease had expired, could not complain against his landlord's entry into his property so long as it has been peaceably made, is not applicable to India, and that under Indian Law a person continuing in possession of the property after the expiry of his tenancy, is not regarded as a trespasser, for his entry was lawful and such possession would both on principle and authority be entitled to protection under section 9 of the Specific Relief Act.

13. The learned counsel for the respondents would say that as the respondents had already entered into possession of the premises, a writ of *mandamus* cannot lie and the petitioner's remedy is only to move the civil court under section 9 of the Specific Relief Act. However, it is already seen that the petitioner has not removed all his articles from the premises, and it has been admitted in the counter-affidavit that some of the petitioner's articles are still inside the premises. Therefore, the petitioner cannot be said to have been dispossessed and the respondents cannot be taken to have got vacant possession of the premises.

14. In this view of the matter the writ petition has to be allowed and accordingly a writ of *mandamus* will issue as prayed for by the petitioner. This order is without prejudice to the rights of the respondents to take possession under due process of law. The petitioner will have his costs from the respondents. Counsel's fee Rs. 250.

R. S. —— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. B. N. Singh, CJ.*

K. Murli Manohar ... *Petitioner**

v.

K. Raghavan and others ... *Respondents*

(A) *Madras City Civil Court Act (VII of 1892), sub-section (2-A) of section 15 as incorporated by Amending Act XXXIV of 1980—Whether retrospective or prospective.*

(B) *Civil Procedure Code (V of 1908), Order 40, rules 3 and 4 as amended by the Madras High Court and Civil Procedure Code Amending Act (CIV of 1976) and Order 43, rule 1 (a)—Order directing Receiver to deposit money— Not appeal but revision only would lie against order directing Receiver to deposit money collected by him.*

A suit was filed in the Court of Fift Assistant City Civil Judge, Madras, for realisation of the licence fee for several years payable by contractors in respect of the suit properties situated at door No. 18, Bazar Road, Mylapore at the rate of Rs. 500 per month. An Advocate-Receiver was appointed and he took possession of the properties. The Receiver was asked to file accounts once in two months. He filed first and second accounts. An application was filed directing the Receiver to account for the income received by him and he filed the third account and followed it by filing a nil account. An application was thereafter taken out for discharging the Receiver and he was discharged from the receivership and another Receiver was appointed in his place. Another application was filed by the fourth plaintiff under Order 9, rule 3 and section 151, Civil Procedure Code, to direct the Receiver to deposit into Court a sum of Rs. 60,750 collected by him from the market and also for a direction to him to file weekly statement of collections made by him. By order, dated 20th September, 1976, the Court ordered the Receiver to deposit Rs. 28,122.74. Aggrieved by the order he

* C. R. P. No. 2661 of 1982. *27th August*, 1982.

preferred a C. M. A. No. 647 of 1976 to the High Court and the fourth plaintiff filed a cross-objection claiming that the Receiver is bound to deposit, a sum of Rs. 60,750. While granting stay in C. M. A. No. 647 of 1976 the High Court directed the Tenth Assistant Judge, City Civil Court to scrutinise the accounts and send a finding. On receipt of finding the High Court remanded the matter to the trial Court with a direction "to scrutinise the accounts of the Receiver and determine to what extent the Receiver is liable to deposit the amounts into Court". The trial Court, on remand, directed the Receiver to deposit Rs. 48,085.86 by its order, dated 20th March, 1981. An appeal was filed against that order C. M. A. No. 137 of 1981 in the Court of the Principal City Civil Judge along with an application for stay. Interim stay was granted on 14th October, 1981. In revision to the High Court, objection was taken to the grant of stay and to the maintainability of the appeal. It was contended that the appeal was not maintainable in that Court since the value of the subject-matter of the appeal was Rs. 48,085-86 whereas the pecuniary jurisdiction of that Court was only Rs. 30,000 even according to the amended provisions of section 16 (2-A) of the Madras City Civil Court Act, 1892 as amended by the Tamil Nadu Act XXXIV of 1980 which came into force on 7th March, 1981, after which date the appeal had been filed. It was also contended that no appeal lay as the order was one passed under Order 40, rule 3, Civil Procedure Code.

Held:—The amendment brought by section 15 (2-A) is retrospective in operation by necessary intendment. [*Para.* 14.]

The criterion for determining is the subject-matter of the suit as in the Civil Courts Act, and the amount or value of the decree of the subject-matter of the appeal is not the deter mining factor. The valuation of the suit is Rs. 19,000 that is to say, below Rs. 30,000 and the order under appeal having been passed after the Tamil Nadu Act XXXIV of 1980 came into force, an appeal would lie to the lower appellate Court, if the order in question is an appealable one. [*Para.* 15.]

If the order is one under Order 40, rule 3, Civil Procedure Code, then surely no appeal would lie but a revision would lie. If however, the order is one under Order 40, rule 4 as amended by the Madras High Court, still another question which will require consideration is as to how far the provisions are consistent with the Civil Procedure Code Amendment Act (CIV of 1976). [*Para.* 16.]

Cases referred to:—

Garikapatti Veerayya v. *N. Subbiah Choudhury*, 1957 S. C. J. 439 : 1957 S. C. R. 488 : (1957) 2 An. W. R. (S. C.) 5 : (1957) 2 M. L. J. (S. C.) 1 : A. I. R. 1972 S. C. 540 ; *Ramanathan Chettiar* v. *L. P. Lakshmanan Chettiar*, (1963) 1 M. L. J. 46 : 76 L. W. 1 : A. I. R. 1963 Mad. 172 ; *Parthasarathi Naidu*, in, re (1957) 2 M. L. J. 250 : 70 L. W. 595 : I. L. R. (1957) Mad. 1016 : A. I. R. 1958 Mad. 94 ; *S. J. Mohan*, in re, (1958) 1 M. L. J. 9 : 71 L. W. 251 : A. I. R. 1958 Mad. 184.

Petition under section 115 of Act V of 1908 to revise the order of the Principal Judge (City Civil Court), Madras, dated 15th December, 1981 in C. M. P. No. 1121 of 1981 in C. M. A. No. 137 of 1981.

G. Viswanathan, for Petitioner.

G. K. Damodara Rao, for Respondents.

The Court made the following

ORDER.—The short question that arises to be decided in this case is as to whether the provisions of sub-section (2-A) of section 15 of the Madras City Civil Court Act, 1892, as incorporated by the Amending Act XXXIV of 1980, and which provision came into force on 7th March, 1981, is retrospective or prospective. The Principal City Civil Judge, Madras, in his order, dated 15th December, 1981 in C. M. P. No. 1121 of 1981 in C. M. A. No. 137 of 1981, under revision, held that it is retrospective in operation and

that the appeal filed before him by the first respondent herein (Advocate-Receiver) was maintainable. It is against this order that the present revision has been filed.

2. The necessary facts for the disposal of this revision petition may be stated: O. S. No. 5109 of 1968 was filed in the Court of the Fifth Assistant City Civil Judge, Madras, for realisation of licence fee for several years payable by the contractors in respect of the suit properties situated at door No. 18, Bazar Road, Mylapore, at the rate of Rs. 500 per mensem. Mr. K. Raghavan, the first respondent, was appointed Advocate-Receiver in Application No. 2092 of 1969 and he took possession of the properties on 11th September, 1972. Though by the order of appointment he was required to file accounts once in two months, he filed his first account on 2nd July, 1973 for the period ending 31st May, 1973 and the second account on 20th March, 1976 for the period from 1st June, 1973 to 30th September, 1975. Thereafter, on 16th March, 1976 an application (I. A. No. 7214 of 1976) was filed for directing the Receiver to account for the income received by him and he filed his third account on 24th March, 1976 for the period from 1st October, 1975 to 29th February, 1976, and finally on 13th October, 1976 he filed a 'nil' account for the period ended 25th July, 1976. Thereafter, I. A. No. 2338 of 1976 was filed for discharging the Receiver and he was discharged from the receivership in August, 1976 and another Receiver was appointed in his place.

3. Another application (I. A. No. 7214 of 1976) was filed by the fourth plaintiff under Order 9, rule 3 and section 151 of the Civil Procedure Code, to direct the Receiver to deposit into Court a sum of Rs. 60,750, collected from the market from November, 1971 to March, 1973. at the rate of Rs. 1,000 per month and at the rateof Rs. 1,250 from April, 1973 to February, 1976 and also for a direction to him to file weekly statement of collections made by the Receiver.

4. By order, dated 20th September, 1976, the Fifth Assistant Judge, City Civil Court, Madras, before whom I. A. No. 2714 of 1976 came up for hearing, directed the Receiver to deposit Rs. 28,122.74. Aggrieved by the said order, the Receiver preferred C. M. A No. 647 of 1976 to this Court and the fourth plaintiff filed a cross-objections claiming that the Receiver is bound to deposit a sum of Rs. 60,750.

5. This Court, while granting stay in C. M. P. No. 12828 of 1976 in C. M. A. No. 647 of 1976, directed the Tenth Assistant Judge, City Civil Court, Madras, to scrutinise the accounts of the Receiver and submit a finding to this Court.

6. On receipt of the finding, Sathiadev, J. allowed the appeal and remanded the matter to the City Civil Court, Madras, with a direction "to scrutinise the accounts of the Receiver and the concerned Court shall go into the accounts, vouchers and other documents and determine to what extent the Receiver is liable to deposit the amounts into Court.

7. After the remand, the trial Court directed the Receiver to deposit a sum of Rs. 48,085,86 by its order, dated 20th March, 1981. Against this order the Receiver filed C. M. A. No. 137 of 1981 in the Court of the Principal City Civil Judge, Madras, and also filed an application (I. A. No. 1121 of 1981) for staying further proceedings of the order under appeal and interim stay was granted on 14th October, 1981.

8 The respondent-appellant objected to the stay of the proceedings before the trial Court on the grounds mentioned therein and also contended that the appeal was not maintainable in that Court since the value of the subject-matter of the appeal was Rs 48,085.86, whereas the pecuniary jurisdiction of the appellate Court was only Rs. 30,000, even according to the amended provisions of section 15 (2-A) of the Madras City Civil Court Act, 1892, as amended by Tamil Nadu Act XXXIV of 1980, which came into force on 7th March, 1981, after which date this appeal has been filed.

9. Another contention raised was that no appeal lay as the order was one passed under Order 40, rule 3, Civil Procedure Code, which, was revisable by the High Court.

10. The Principal City Civil Judge came to the conclusion that the amended provision of section 15 (2-A) was retrospective, and as the valuation of the suit was Rs. 19,000, the appeal will lie before the lower appellate Court. He, however, did not go into the question as to whether against the impugned order an appeal would lie or only a revision would lie.

11. The learned counsel for the petitioner has urged that it is true that the order was passed after the amendment came into force, but the amount involved in the order against which the appeal was filed was more than Rs. 30,000 and therefore, the appeal will lie in the High Court. He submitted that unless both the conditions, namely, the order being passed after 7th March, 1981, and the subject-matter of appeal being less than Rs. 30,000, are satisfied the appeal will lie before the lower appellate Court. His other submission was that the forum of appeal would be guided according to the provisions as obtained when the suit was filed in 1968, as the appeal is a continuation of the suit, unless the Amending Act has been made applicable retrospectively, which is not the position in the instant case. The learned counsel, in support of his contention, relied on the decision of the Supreme Court in the case of *Garikapatti Veerayya* v. *N. Subbiah Choudhury*[1]. It has been held therein that the right of appeal was a substantive right and although it could be exercised only in case of an adverse decision, it was governed by the law prevailing at the time of commencement of the suit and comprises of successive rights of appeal from Court to Court, which really constituted one proceeding. Such a right could be taken away only by a subsequent enactment *either expressly or by necessary intendment.* Even according to the aforesaid decision, relied on by the learned counsel, on the basis of the valuation of the suit, the appeal would lie to the High Court unless the amendment brought by section 15 (2-A) was expressly or by necessary intendment retrospective.

12. Section 13 of the Madras Civil Courts Act, 1873, before its amendment by the Tamil Nadu Act XXXIV of 1980, originally provided that appeals from the decrees and orders of Subordinate Judges and District Munsifs would lie to the District Court when the amount or value of the subject-matter of the suit did not exceed Rs. 5,000 which was raised to Rs. 10,000, by the Tamil Nadu Act XVII of 1956, which came into force on 1st April, 1957. Similar provision was also made in section 15 of the Madras City Civil Court Act, 1892, by the Tamil Nadu Act XVIII of 1971. The purpose behind the amendment was to reduce the arrears and the load of appeals in the High Court by extending the jurisdiction of the lower appellate Court.

13. The question whether the amendment brought by the Tamil Nadu Act XVII of 1956 in Madras City Civil Court Act was prospective or retrospective, came to be considered by a Full Bench of this Court in the case of *Av. P. L. Ct. Ramanathan Chettiar and another* v. *L. P. Lakshmanan Chettar (died) and others*[1], and the Full Bench held as follows :

> "In the present case there can be little doubt that the object of the Legislature in enacting Madras Act XVII of 1956 was to reduce the arrears in the High Court, that was achieved by enlarging the appellate jurisdiction of the District Court to cases where the value of the subject-matter of the suits was below Rs. 10,000. That object could be achieved only if retrospective operation was given to the amendment. The postponement clause in such cases would have a significance, as indication of the intention of the Legislature that it should apply to all cases where appealable orders are passed subsequent to the appointed date."

And the decision in *Parthasarathi Naidu*, In re[2], was approved.

14. In the instant case also the amending Act XXXIV of 1980 amended the original section 15 of the Madras City Civil Court Act, 1892, by inserting the new sub-section (2-A) which reads as follows—

1. 1957 S. C. R. 488 : 1957 S. C. J. 439 : (1957) 2 An. W. R. (S.C.) : 1 (1957) 2 M. L. J. (S. C.) 1 : A. I. R. 1976 S. C. 540.

1. (1963) 1 M. L. J. 46 : 76 L. W. 1. I. L. R. (1963) Mad. 183 : A. I. R. 1963 Mad. 175 (F. B.).
2. (1957) 2 M. L. J. 250 : 70 L. W. 595 : I. L. R. (1957) Mad. 1016 : A. I. R. 1958 Mad. 94.

"An appeal shall lie to the Principal Judge from any decree or order appealable under the provisions of the Code of Civil Procedure, 1908 (Central Act V of 1908), passed in any suit or proceeding by a Judge other than the Principal Judge or an Additional Judge on or after the date of the commencement of the Tamil Nadu Civil Courts and the Madras City Civil Court (Amendment) Act, 1980. where the amount or value of the subject-matter does not exceed thirty thousand rupees."

Tamil Nadu Act XXXIV of 1980, as in the case of the Tamil Nadu Act XVII of 1956, with which the Full Bench was concerned, provided that the Act will come into force on such date as may be specified by the State Government, and although the Act had been passed earlier, it came into force on 7th March, 1981. On a parity of the reasoning, as laid down by the Full Bench, and the purpose of the present amendment also being to reduce the arrears in the High Court, it must be held that the amendment brought by section 15 (2-A) is retrospective in operation by necessary intendment.

15. Coming to the question whether the valuation of the suit or the amount directed by the Court to be deposited by the Receiver would be the guiding factor for the purpose of determining the forum of appeal, it is the valuation of the suit which will determine the forum of appeal, as held by the Supreme Court in *Garikapatti Veerayya* v. *N. Subbiah Choudhry*[1]. Following the said decision, Panchapakesa Ayyar, J. held in the case of *S. J. Mohan*, In re[2], that the criterion for determining the forum is the subject-matter of the suit, as in the Civil Courts Act. and the amount or value of the decree of the subject-matter of the appeal is not the determining factor, I am in respectful agreement with the above view. It must, therefore, be held that the valuation of the suit which is Rs. 19,000, that is to say, below Rs. 30,000, and the order under appeal having been passed after the Tamil Nadu Act XXXIV of 1980 came into force, an appeal would lie to the lower appellate Court, if the order in question is an appealable one.

16. Coming to the next contention of the learned counsel that the order in question was not an appealable order, but a revisable order and therefore, no appeal would lie before the lower appellate Court, although this question was raised before the lower appellate Court, surprisingly the lower appellate Court has failed to consider this question and has erred in holding that that question did not arise for consideration. Having held that the provision of section 15 (2-A) was retrospective, it wrongly held that that was sufficient to conclude the matter which, in fact, was not. If the order is one under Order 40, rule 3, Civil Procedure Code, then surely no appeal would lie, but a revision would lie. If, however, the order is one under Order 40, rule 4, as amended by the Madras High Court, still another question that will require consideration is as to how for the provisions are consistent with the Civil Procedure Code Amendment Act CIV of 1976. I need not go into this question as to whether the order was passed under Order 40, rule 3 or 4, as it has not been investigated by the lower appellate Court. The lower appellate Court will go into the question first and thereafter dispose of the matter in accordance with law.

17. The civil revision petition is disposed of in the light of the observations made above. In the circumstances of the case, there will be no order as to costs.

R. S. —— *Order accordingly.*

1. 1957 S. C. R. 488 : 1957 S. C. J. 439.
2. (1958) 1 M. L J. 9 : 71 L. W. 251 : A. I. R. 1958 Mad. 184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

K. M. Raghothaman and another
... *Appellants**

v.

M. P. Kannappan and another
... *Respondents.*

Hindu Succession Act (XXX of 1956), section 6—Hindu Law, joint family property—Debt incurred by father for binding purposes and for family necessity—Death of a son subsequently—Mother succeeding to the deceased son's share in joint family property—Whether deceased son's share in the family property liable for the debt incurred by the father—Suit filed by creditor—Decree obtained and execution effected against family property—Deceased son's share also held liable.

"*A*", a Hindu father along with his two sons "*R*" and "*B*" constituted a Hindu undivided family. "*A*" had borrowed from one "*K*" in 1968 for family necessity on a promissory note. *K* filed a suit in 1971 against "*A*" and obtained a decree. "*B*", his son had died in 1970 and *B*'s mother had succeeded to his share in the joint family property. *K* filed an execution petition in 1971 and attached the joint family properties, and brought them to sale in 1973. With the leave of Court '*K*' purchased the properties. In 1974, '*K*' also took delivery of the properties. Immediately thereafter "*R*" and his mother filed a suit for a declaration of title to the suit property against "*K*" and "*A*", claiming that the share of "*R*" and the deceased "*B*" in the family properties cannot be made liable for the debt incurred by "*A*". It was also contended that the share of the deceased "*B*" had devolved on his mother under section 6 of the Hindu Succession Act, and that thereafter it had become her absolute property, that the pious obligation of "*B*" to discharge the debt of his father *A* ceased even before the Court sale in March, 1973 and therefore the share of "*B*" cannot be made liable for the debt incurred by "*A*". The suit was dismissed by the trial Court and this was confirmed by the lower appellate Court. "*R*" and his mother appealed.

Held: In this case, the debt in question was incurred for purposes binding on the son "*B*" and his undivided share in the family properties. The finding in this regard has not been challenged at all. In the normal course, therefore, "*K*" would be entitled to proceed against the undivided interest of "*B*" in the family properties for the realisation of the debt under the decree obtained against the father (*A*), even when the family continued to remain undivided. As to whether section 6 of the Hindu Succession Act brings about any change in this regard the position may be stated thus: The proviso to section 6 is really limited in scope and is in the nature of an exception to the normal operation of the rule of survivorship. In other words, if a male Hindu who dies after 17th June, 1956, leaving him surviving a female relative specified in class I of the schedule to the Act or a male relative specified in that class claiming through such female relative, then devolution of such interest by survivorship does not take place; but instead the interest of the deceased in the Mitakshara coparcenary properties would roll down by testamentary or intestate succession. Beyond this, the proviso does not purport to bring about any other change or free such interest from the burden or liability to which it is already subject. *Explanation* I to section 6 merely enables the ascertainment of the interest of the deceased at the time of his death for purpose of operation of either survivorship or succession intestate or testamentary, but does not have the effect of relieving such interest from the burden or obligation to be available for the satisfaction of binding debts. The family continues unaffected as before with all its properties, assets, liabilities and obligations, excepting that in a case governed by the proviso an heir or a legatee is introduced into the family as a person entitled to succeed to the interest of a deceased male member. *Explanntion* I does not go beyond this, *Explanation* II precludes a person who had already separated himself from the coparcenary before the death of the deceased

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*S. A. No, 2501 of 1977. 12*th* April, 1982.

or his heirs from claiming a share in the devolving interest as on intestacy.

[*Para.* 8.]

In the instant case, the second appellant (mother) was placed in the position of "*B*" with reference to his interest which he died possessed of, subject to his obligations. In other words, the second appellant, no doubt, succeeded to the undivided 1/3rd share of the deceased "*B*" in accordance with the provisions of section 6 of the Act, but it did not bring about the disruption of the family or the freeing of *B*'s interest from its liability to pay debts. It may be that in such a situation the father who could have otherwise sold the son's interest, may not be in a position to do so, as one son had died and his interest had devolved on another person and that cannot be subjected to any further control by the father. It must be remembered that this precisely would have been the position, if a partition had taken place between the father and the sons. But, even in such cases it has been uniformly held that despite the partition wherein no provision is made for the discharge of valid and binding debts, the share of the son could still be made liable to answer such claims. This would be on the footing that the liability on the share of the sons exists right from the inception of the binding debt and not only from the time the debt is sought to be recovered or enforced, as otherwise the shares of the sons might enjoy a holiday, as it were, from liability, between the date of the incurring of the debt, and the date of the birth of the son or the date of enforcing the same or the obtaining of a decree on the debt.

[*Para.* 9.]

The liability of the sons commenced when the binding debt is incurred and continues till the liability subsists. It also seems that if the liability for a debt on the sons exists from the inception of the debt, then no subsequent act of the parties or event could be permitted to defeat the right of the creditors to realise the same from such property. In this case, it would be all the more so, as the family had continued to remain undivided when the binding debt was incurred and the decree was obtained and the family continued to remain so. However, in order to realise the binding debt from out of the shares of the sons, it is not necessary that such liability should be fastened or charged upon the shares of the sons. The liability in cases like this must be understood in the ordinary sense that the estate of a person who owes a debt is liable to pay it, when the estate is reduced to separate possession or when it passes on to another upon the death of that person.

[*Para.* 12.]

The share of '*B*' succeeded to by the second appellant (mother), who had merely stepped into the shoes of her son, who was obliged to discharge the debts of "*A*" under the theory of pious obligation would also be liable and his share was rightly proceeded against.

[*Para.* 13.]

Cases referred to:—

Chinta Lakshminarasayya v. *Lakuvarapu Papayya*, 1955 An. W. R. 44 : A. I. R. 1955 A. P. 97 ; *Saradambal* v. *Subramania Iyer*, (1941) 2 M. L. J. 862 : I. L. R. (1942) Mad. 630:54 L. W. 651 : A. I. R. 1942 Mad. 212 ; *Abdul Hameed Sait* v. *Provident Investment Co., Ltd.*, (1954) 2 M. L. J. 416 : I. L. R. (1954) Mad. 939 : 67 L. W. 681 : A. I. R. 1954 Mad. 961 : *Mt. Mallan* v. *Parmatma Das*, A. I. R. 1936 Lahore 558 ; *Sheo Ram* v. *Sheo Rattan*, A. I. R. 1921 All. 163 ; *Kollapudi Govindama* v. *Mandru Bullamma*, (1956) An. W. R. 649 : A I. R. 1957 A. P. 47 ; *Kollapudi Govindamma* v. *Mandru Bullamma*, (1962) 1 An. W. R. 151 : A. I. R. 1962 A. P. 243 ; *Koduru Venuku Reddi* v. *Magunta Venku Reddi*, (1927) I. L. R. 50 Mad. 535 : 52 M. L. J. 387 : 25 L. W. 784 : A. I. R. 1927 Mad. 471 ; *Modi Muthu Bai Motilal* v. *Chotobai Manibai*, A. I. R. 1963 Guj. 68.

Appeal against the decree of the Sub-Court of Vellore in A. S. No. 192 of 1976 preferred against the decree in O. S. No. 405 of 1974, District Munsif Court of Ranipet.

M. N. Padmanabhan, for Appellants.

N. Vanchinathan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in O. S. No. 405 of 1974, District Munsif's Court, Ranipet, are the appellants in this second appeal, which has been entertained on the following question of law—

"Whether on the death of Balaji, one of the sons of the second defendant, the 1/3rd share vested in the mother, namely, the second plaintiff, without the liability to answer the second defendant's debts?"

In order to fully appreciate the circumstances under which this question has arisen for decision, a brief reference to the facts and the findings of the Courts below is necessary. The first appellant is the son of the second respondent, while the second appellant is the wife of the second respondent. On 5th July, 1968, the second respondent borrowed for family purposes certain amounts from the first respondent on a promissory note on the basis of which the first respondent instituted O. S. No. 318 of 1971, District Munsif's Court, Ranipet, against the second respondent and obtained a decree for the recovery of a sum of Rs. 3,562.50. In execution of that decree, in E. P. No. 73 of 1971, the first respondent attached not only the interest of the second respondent in certain properties, but also that of his undivided sons, *viz*, the first appellant and one Balaji. The first appellant preferred a claim with reference to a one-third share in the properties attached, but that claim was not countenanced. The properties attached by the first respondent were thereafter brought to sale and in the sale held on 19th March, 1973, the first respondent purchased the properties with the leave of Court. The second respondent filed a petition in O. E. A. No. 937 of 1973 to set aside the Court sale and that petition was dismissed. Later, the sale in favour of the first respondent was confirmed on 21st March, 1974 and possession of the properties was also delivered to him through Court on 31st August, 1974. Thereafter, the appellants instituted on 23rd September, 1974. O. S. No. 405 of 1974, District, Munsif's Court, Ranipet, for a declaration of their title to the suit property and also for an injunction restraining the first respondent from interferring with their possession and enjoyment of the suit property or in the alternative for declaration of joint title of the appellants and a consequential permanent injunction and for other incidental reliefs. According to the case of the appellants, the first appellant and his brother deceased Balaji and their father, the second respondent herein, constituted members of a Hindu undivided family. which owned the suit property, viz., Survey No. 113/6 of an extent of 1.09 acres in Agaram village in Arcot taluk and other properties and that in order to prevent the dissipation of the properties by the second respondent, a division was effected at the instance of Panchayatdars between the first appellant, his brother Balaji and the second respondent and a Kurichit was also drawn up on 9th February, 1962, under which the A schedule properties fell to the share of the second respondent, B schedule properties to the first appellant and the C schedule properties to the share of late Balaji. The further case of the appellants was that sometime in 1972, Balaji, died and under section 6 of the Hindu Succession Act, the second appellant, the mother of Balaji, succeeded as heir to the estate of Balaji. The debt incurred by the second respondent and the decree obtained thereon by the first respondent in O. S. No. 318 of 1971, District Munsif's Court, Ranipet in execution of which the property was brought to sale and purchased by the first respondent, were claimed by the appellants to be not for family necessity or benefit and therefore, not binding upon the appellants, who had already become divided members. The appellants also stated that after the division in the year 1962, the second respondent had no capacity to represent or deal with his sons' share and convey their interest as well. A further plea was also put forth by the appellants that the second respondent was given to bad habits and as such, the debt and the decree obtained thereon in O.S. No 318 of 1971 as well as the execution proceedings would not bind them. The appellants also set up title to the suit property by adverse possession. The appellants also claimed that owing to the death of Balaji in 1972, his share passed on to his mother, the second appellant and therefore, the debt will not be binding upon that share but only upon the 1/3rd share of the second respondent.

2. The first respondent in the course of his written statement disputed the partition between the second respondent and his minor sons and the drawing of the lists and allot-

ment of properties thereunder, but maintained that the family continued to remain joint of which the second respondent was the manager. The debt incurred by the second respondent was for family necessity and benefit, according to the first respondent and that such a debt was binding not only upon the second respondent, but also his sons, the first appellant and Balaji. According to the first respondent, the decree obtained in O. S. No. 318 of 1971, District Munsif's Court, Ranipet, on the footing of such a debt was binding on the second respondent, first appellant and Balaji and their undivided interest in the family properties and also on second appellant and therefore, no exception could be taken to the Court sale. After referring to the Court sale and the purchase therein of the suit property by the first respondent, the first respondent proceeded to state that he was in possession and enjoyment of the property pursuant to the Court auction sale in his favour and therefore, no relief could be granted in favour of the appellants.

3. Before the learned District Munsif, Ranipet, on behalf of the appellants, Exhibits. A-1 and A-2 were marked and P. Ws. 1 to 3 were examined, while on behalf of the first respondent, Exhibits. B-1 to B-3 were filed and he was also examined as D. W. 1. On a considerntion of the oral as well as the documentary evidence, the learned District Munsif found that the division in 1962 and the allotment of properties to the second respondent and his sons, viz, the first appellant and Balaji was not satisfactorily established and that the family continued to remain undivided. The debt incurred by the second respondent, which later on ripened into a decree in O. S. No. 318 of 1971, District Munsif's Court, Ranipet, was found to have been incurred by the second respondent for purposes of family necessity and so binding upon the first, appellant and Balaji as well. It was further found that the execution proceedings in O. S. No. 318 of 1971 would be binding upon the appellants and that the Court auction sale could not be in any manner impugned by them. On these conclusions, the suit was dismissed. Aggrieved by this, the appellants preferred an appeal in A. S. No. 192 of 1976 Sub-Court, Vellore. The learned Subordinate Judge, on a reconsideration of the evidence found that the division and the allotment of properties to the respective parties at such a division in 1962 were not proved and that the debt incurred by the second respondent was only for family benefit or necessity and it was not open to the appellants to question the decree or debt. It was also found by the learned Subordinate Judge that in so far as the first appellant was concerned, he had not instituted a suit within a period of one year after the rejection of his claim under Order 21, rule 63, Civil Procedure Code, and that therefore, he could not agitate his rights in relation to the property in this suit. Dealing with the contention that by reason of the operation of section 6 of the Hindu Succession Act, 1956, the second appellant absolutely and therefore, her one-third share succeeded to the share of Balaji cannot be affected by the Court sale, the learned Subordinate Judge held that the debt having been incurred by the second respondent long prior to the death of Balaji, the second respondent was competent to bind even the interest of Balaji, so long as the debt was incurred for a lawful and binding purpose. In this view, the judgment and decree of the trial Court were confirmed and the appeal was dismissed.

4. When the second appeal originally came up for hearing Sethuraman, J. felt that the date of death of Balaji and the date on which the suit property was attached in execution of the decree in O. S. No. 318 of 1971, District Munsif's Court, Ranipet, would assist in satisfactorily deciding the question raised in the second appeal and called for a finding in that regard. By an order, dated 27th January, 1982, the learned Principal Subordinate Judge, Vellore, submitted a finding to the effect that Balaji died on 17th October, 1970, and not in 1972, as claimed by the appellants in their plaint and that the attachment over the property was effected on 23rd November, 1971. To this finding, the first respondent has filed objections. It is thereafter the second appeal has again come up for further hearing on the findings so submitted.

5. Before proceeding to consider the point urged in the second appeal, it would be necessary to advert to certain aspects over which there is no controversy between the parties. It is accepted by the appellants that there was no partition and allotment of properties to the members of the family in the year 1962, but that the family continued to

remain undivided at all relevant times. The concurrent finding of the Courts below that the debt incurred by the second respondent, which later ripened into a decree in O. S. No. 318 of 1971, District Munsif's Court, Ranipet, was for binding purposes and for family necessity and Balaji's undivided interest was also bound, is accepted by the appellants.

6. The learned counsel for the appellants submitted that under section 6 of the Hindu Succession Act (hereinafter referred to as the Act), on the death of Balaji on 17th October, 1970, leaving behind him, his mother, the second appellant herein who is a female relative specified in Class I of the schedule to the Act, the undivided 1/3rd interest of Balaji devolved upon her by intestate succession and thereafter, it became her exclusive property and as such, the pious obligation of Balaji to discharge the debt incurred by the father, the second respondent, ceased even before the Court sale took place on 19th March, 1973. It was also pointed out that the effect of section 6 of the Act is to bring about a partition among the members of the undivided family of the second respondent immediately before the death of Balaji and that the divided share of Balaji cannot be subjected to the liability under the decree obtained by the first respondent in O. S. No. 318 of 1971. District Munsif's Court, Ranipet. *Per contra*, the learned counsel for the first respondent submitted that the pious obligation of the sons of the second respondent was in existence ever since the debt was incurred and as in this case, it has been found that the debt had been incurred for valid and binding purposes, the pious obligation of the sons to discharge such a debt from out of their shares in the family property subsisted right through and the mere interposition of an heir by reason of section 6 of the Act cannot either put an end to that liability or enable the second appellant to take the property free from that liability. It was further submitted that even if Balaji himself prior to his death had entered into a partition in respect of the family properties and had obtained some properties towards his share without making any arrangement in such a partition for the discharge of the binding debt which had ripened into a decree, the share of Balaji would have nevertheless been liable to pay the binding debt and therefore, the second appellant, who had merely stepped into the shoes of Balaji by operation of statute, cannot claim higher rights. The learned counsel for the first respondent also pressed into service the well recognised principle that no person can be permitted to take the estate of another free from debts binding on it.

7. The principle relating to the liability of the sons for debts incurred by the father may be briefly recapitulated. In respect of debts contracted by the father, even for his personal benefit, at a point of time when he is joint with his sons, the sons are liable to pay such debts, unless the debts were incurred for immoral or illegal purposes. This liability of the sons, which had its origin in an obligation of piety and religion, has since metamorphosed into one of legal liability but this does not, however, extend to debts tainted with immorality. The liability is not, however, personal in the sense that the creditor of the father cannot proceed either against the person or separate property of the sons, but such liability is restricted to the interest of the sons in the family property. It is settled that if the debt is contracted by the father after partition, the son cannot be made liable. If, however, the debt is a pre-partition debt, the share of the sons would be liable even after partition, if the debts of the father are not immoral or illegal and the partition arrangement does not make any provision for the discharge of such debts. In case a creditor institutes a suit for the recovery of a debt against the father before partition and obtains a decree, the sons would be liable to discharge the decree passed against the father even after the partition. Even in respect of a pre-partition debt if a suit is instituted against the father, after partition, but he dies and his separated sons are impleadad as legal representatives, the remedy of the decree-holder against the shares allotted to the sons on partition, would be in execution and not by way of an independent suit. If, however, after partition, a suit is instituted against the father on a pre-partition debt and a decree is obtained against him, such a decree cannot be executed against the sons and a separate suit has to be brought against the sons in order to enable the creditor to realise the amounts out of their shares, though the liability of the sons for the payment of the pre-partition debts admits of no doubt. Thus the liability of the interest

of the sons in such cases to discharge the debts incurred by the father is undisputed, though the method and manner of its enforcement by the creditor would vary and the sons must be afforded every opportunity, be it in a suit or execution proceedings to question the binding nature of the debt or liability.

8. In this case, it has earlier been noticed that the debt in question was incurred for purposes binding on the son Balaji and his undivided share in the family properties. Indeed, the finding in this regard has not been challenged at all. In the normal course, therefore, the first respondent would be entitled to proceed against the undivided interest of Balaji in the family properties for the realisation of the debt under the decree obtained against the father, the second respondent. even when the family continued to remain undivided. Whether section 6 of the Act brings about any change in this regard may now be considered. Section 6 of the Act runs as under :—

> "6. *Devolution of Interest in Coparcenary Property*—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakhara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :
>
> Provided that, if the deceased had left behind him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation 1.*—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation 2.*—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

The first part of this section sets out in bold relief an affirmation and re-statement of the well-known principle of devolution by survivorship of the interest of a Hindu, who dies having such an interest in Mitakshara coparcenary property, upon the surviving members of the coparcenary. The proviso is really limited in scope and is in the nature of an exception to the normal operation of the rule of survivorship. In other words, if a male Hindu who dies after 17th June, 1956, leaving behind him surviving a female relative specified in Class I of the schedule or a male relative specified in that Class claiming through such female relative, then devolution of such interest by survivorship does not take place ; but instead the interest of the deceased in the Mitakshara coparcenary properties would roll down by testamentary or intestate succession. Beyond this, the proviso does not purport to bring about any other change or free such interest from the burden or liability to which it is already subject. There being no question of testamentary succession in this case, as Balaji had not left any will the effect of the proviso would be to bring about a devolution of the interest of Balaji on the second appellant. *Explanation* I to section 6 of the Act furnishes a formula to measure the interest upon which survivorship or testamentary or intestate succession, as the case may be, may operate. The quantitative content of that interest had to be ascertained on the footing that a notional partition had taken place immediately before death, irrespective of whether he was entitled to claim a partition or not. Even this *Explanation* merely enables the ascertainment of the interest of the deceased at the time of his death for purpose of operation of either survivorship or succession, intestate or testamentary, but does not have the effect of relieving such interest from the burden or obligation to be available for the satisfaction of binding debts. The family continues unaffected as before with all its properties, assets, liabilities and obligations, excepting that in a case governed by the proviso an heir or a legatee is introduced into the family as

a person entitled to succeed to the interest of a deceased male member. *Explanation* I does not go beyond this. *Explanation 2* precludes a person who had already separated himself from the coparcenary before the death of the deceased or his heirs from claiming a share in the devolving interest as on intestacy.

9. It has been already noticed that the juxtaposition of a female relative specified in Class 1 of the schedule to the Act or a male relative in that Class claiming through such a female relative or a legatee does not bring about any other change in the family. Applying this to the instant case, at best, the second appellant was placed in the position of Balaji with reference to his interest which he died possessed of subject to his obligations. In other words, the second appellant, no doubt succeeded to the undivided 1/3rd share of the deceased Balaji in accordance with the provisions of section 6 of the Act but it did not bring about the disruption of the family or the freeing of Balaji's interest from its liability to pay debts. It may be that in such a situation, the father, who could have otherwise sold the sons' interest, may not be in a position to do so, as one son had died and his interest had devolved on another person and that cannot be subjected to any further control by the father. It must be remembered that this precisely would have been the position, if a partition had taken place between the father and the sons. But, even in such cases it has been uniformly held that despite the partition wherein no provision is made for the discharge of valid and binding debts, the share of the sons could still be made liable to answer such claims. This would be on the footing that the liability on the share of the sons exists right from the inception of the binding debt and not only from the time the debt is sought to be recovered or enforced, as otherwise the shares of the sons might enjoy a holiday, as it were, from liability, between the date of the incurring of the debt, and the date of the birth of the son or the date of enforcing the same or the obtaining of a decree on the debt. In such a case, if between the date of the incurring of the debt and its enforcement by instituting a suit, or obtaining of a decree, a partition should take place, the share of the son may not be liable, but that is not the established position in law.

10. The liability of the sons commences when the binding debt is incurred and continues till the liability subsists. Otherwise, a father or even his sons desiring to avoid payment of binding and lawful debts, can enter into a partition well-timed and then claim that the partitioned or separated shares are no longer liable to meet the binding debts. To avoid this situation, the theory of pious obligation subjects the shares of the sons to such a liability. This would be logical as well in that the male issues acquiring an interest by birth only in the property, should also pay the binding debts to the extent of such property, both during the lifetime of the father and after his death, till the liability subsists. Therefore, the mere fact that the property had changed hands by one's own volition or owing to operation of law would not make any difference to the libility of the share of the sons. It also seems that if the liability for a debt on the sons exists from the inception of the debt, then no subsequent act of the parties or event could be permitted to defeat the right of the creditors to realise the same from such property. In this case, it would be all the more so, as the family had continued to remain undivided when the binding debt was incurred and the decree was obtained and the family continued to remain so. However, in order to realise the binding debt from out of the shares of the sons, it is not necessary that such liability should be fastened or charged upon the shares of the sons. The liability in cases like this, must be understood in the ordinary sense that the estate of a person who owes a debt is liable to pay it, when the estate is reduced to separate possession or when it passes on to another upon the death of that person.

11. The only case nearest to the instant one brought to my notice in *Chinta Lakshminarasayya and others* v. *Laghuvarapu Papayya*[1], where Subba Rao, CJ. (as he them was) had occasion to deal with the question, though not under the provisions of the Act. Therein, the mother who succeeded to her son's estate, made certain alienations to discharge the debts binding upon her

1. 1955 An. W. R. 44: A. I. R. 1955 A. P. 97.

son's estate and these were challenged by the reversioners. It was found that the transactions were entered into to discharge the debts incurred by her husband and other similar debts incurred by her during the minority of her son, to whom she succeeded. Even so, it was contended that the mother succeeding to the estate of her son, had no power to deal with or alienate any part of her son's estate to discharge the debts of her husband, which her son was liable to pay on the principle of pious obligation. In considering this contention, Subba Rao, CJ. (as he then was) after referring to the texts and the decisions in *Saradambal* v. *Subbaramania Iyer*[1], and *Abdul Hameed Sait* v. *Provident Investment Company Limited*[2], observed at page 98 as under—

> "If follows from the aforesaid observations that the liability of the son is a legal liability binding on the joint family estate. During the lifetime of the father, the father can alienate the son's interest also in the joint family to discharge his debts. A creditor of the father may realise the debt from the entire estate. Even after the father's death, the entire joint family property in the hands of the son would be liable for the father's debts, provided it is not incurred for illegal and immoral purposes. If so, at the time of the son's death, his estate consists of not only his assets, but also his liabilities. Whatever may be the source or origin of that liabillty. A heir succeeding to the estate—it is immaterial, whether the heir takes a limited estate or an absolute estate—takes both the assets and liabilities".

12. In considering the question whether the liability on the property should only be in the nature of a charge or encumbrance, it will be useful to refer to *Mt. Mallan* v. *Parmatma Das*[3]. There a Hindu governed by the Mitakshara after incurring a debt during his lifetime, died leaving a son and a widow, and son also subsequently died leaving a widow and the question that arose was whether the property left by the son and in the hands of the widow was liable to satisfy the debt incurred by the original owner of the property. In dealing with that question, it was observed by the learned Judges thus—

> "The word 'encumbered' therefore does not in the ruling mean an 'incumbrance' in the sense of a hypotheca or charge on the property at all. It is merely used in the ordinary sense that the estate of a person who owes a debt is liable to pay it upon the decease of that person; anybody inheriting that estate takes subject to the debt. There is no distinction at all between a personal obligation to pay a debt, which is the duty of the original debt or of the pious obligation conferred by the Hindu Law against the son of the original debtor. The piety or the obligation does not make it cease to be a personal obligation to pay a debt....... Upon the death of the husband if there had been no son it is clear that the property should have been subject to the debt created by the husband Mt. Malan's right of maintenance would not have priority over the debt. In the hands of Nand Lal. there was personal obligation on Nand Lal, to pay the debt of his father Nathan Mal, and similarly when he died and Mt. Prakasho inherited his estate, she took it subject to the obligation to pay the debts due from Nand Lal".

Subba Rao, CJ. (as he then was) in *Chinta Lakshminarasayya and others* v. *Laguvarapu Papayya*[1], accepted the aforesaid observations as laying down the correct principle and I am in respectful agreement with him. The learned counsel for the respondent places strong reliance upon the decision in *Sheo Ram* v. *Sheo Ratan*[2]. In that case it was held that the mother was not bound to pay the debts which the son was liable to pay by reason of the principle of pious obligation In doing so. it was observed that unless the property was encumbered in the sense that it was charged for the payment of the debt, the mother would not be liable 'to pay the debt of the son. In *Chinta Lakshminarasayya and others* v. *Laghuvarapu Papayya*[1], this decision has been referred to and it has been stated that the word encumbered' should not be understood in the sense of a

1. (1941) 2 M. L. J. 862 : I. L. R. (1942) Mad. 630: 54 L. W. 651 : A. I. R. 1942 Mad. 212.
2. 67 L. W. 681 I. L. R. (1954) Mad. 939: (1954) M. L. J. 416 : A I. R. 1954 Mad. 961. (F. B).
3. A. I. R. 1936 Lah. 558.

1. (1955) An W. R. 44 : A. I. R. 1955 A. P. 97
2. A. I. R. 1921 All. 163.

charge, but only in the ordinary sense that the estate of a person who owes a debt is liable to pay it upon the decease of that person. Subba Rao, CJ. in the course of the decision referred to already has also pointed that what was merely a pious obligation has now become crystallised into a legal liability of the son, though confined to joint family properties and in that context also, the liability need not be one which is charged on the estate, but payable out of the estate of the person who owed the debt.

13. The learned counsel for the appellants relied upon the decision in *Kollapudi Govindamma* v. *Mandru Bullamma*[1], which was confirmed in *Kollapudi Govindamma* v. *Mandru Bullamma*[2] and submitted that the decision in *Chinta Lakshminarasayya and others* v *Laghuvarappu Papayya*[3], cannot be applied to the present case. In the decision referred to by the learned counsel for the appellants, the question that arose for consideration was whether the property in the hands of the mother, who had succeeded to her son, can be deemed to be the property in the hands of the son or other descendants within the meaning of section 53 of the Civil Procedure Code. It was in that context Chandra Reddy, J. as well as the Bench held that section 53 of the Civil Procedure Code can have no application to a case, where property had passed into the hands of persons other than the sons, grandsons and great grandsons of the ancestors. Referring to *Chinta Lakshminarasayya and others* v. *Laghuvarapu Papayya*[3], the Bench stated that the principle of that decision had no application to the facts of that case. As pointed out earlier, the principle which would govern the present case would be what is clearly laid down in *Chinta Lakshminarasayya and others* v. *Laghuvarapu Papayya*[3] though that decision was rendered prior to the Hindu Succession Act, 1956. *Koduru Venku Reddi* v. *Magunta Venku Reddi*[4], rules that the purchaser of an undivided share of a coparcener gets an equity to enforce partition and takes the share when partitioned subject to all the liabilities in the hands of the vendor, including the liability on account of the pious obligation of the son to pay the just and binding debts of the father. Further, in *Modi Muthu Bai Motilal* v. *Chotibai Manibai*[1], it has been held that the theory of pious obligation does not stand abrogated by reason of the provisions of the Act. Viewed in the aforesaid light, the share of Balaji succeeded to by the second appellant, who had merely stepped into the shoes of her son, who was obliged to discharge the debts of the second respondent under the theory of pious obligation would also be liable and his share was rightly proceeded against. No other point was urged. Consequently, the second appeal fails and is dismissed with costs of the first respondent.

S. J. —— *Appeal dismissed.*

1. (1956) An W. R. 649 : A. I. R. 1957 A. P. 47
2. (1962) 1 An. W. R 151 : A. I. R. 1962 A. P. 243.
3. (1955) An W. R. 44 : A. I. R. 1955 A. P. 97.
4. I. L. R. 50 Mad. 535 : 52 M. L. J. 387 : 25 L. W 784 : A. I. R. 1927 Mad. 471. (F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Srinivasa Pillai (died) and others ... *Appellants**

v.

K. Ragunathan ... *Respondent*

Injunction—Vacant site—When decree of permanent injunction can be granted—Permanent injunction not to be granted only on the ground of plaintiff's possession without adjudicating question of title.

Held, Nobody can dispute the general principle that a person in peaceful possession is entitled to be maintained in possession against all but the true owner and the suit by such a person for an injunction against any other person threatening to disposses him is maintainable and there could be an investiga

1. A. I. R 1963 Guj. 68.

* S. A. No. 1999 of 1978. 22nd September, 1982.

tion of his cause and relief granted if thers is a warrant for it on facts.

In the present case, there is a dispute on the question of title to the suit property between the plaintiff and the defendant. Either it must be found that the plaintiff has title by deed or by adverse possession and if he is found to be in possession on the date of the suit, the plaintiff is entitled to have his possession protected by a decree of permanent injunction.; or it must be found that the plaintiff is in possession on the date of the suit and the defendant has not title to the suit property and in that circumstance also the plaintiff's possession can be protected. There is a glaring omission to approach the controversy in issue and find the solution for the same keeping in mind the above principles, and as stated above only on the ground that the plaintiff is in possession and the defendant is not in possession and without adjudicating the question of title one way or the other, the lower appellate Court has chosen to decree the suit. This approach and the reasoning of the lower appellate Court do not fit in with the well-accepted principles set out above. [*Para.* 4.]

Cases referred to:—

M. Kallappa Setty v. *M. V. Lakshminarayana Rao*, (1973) 1 S. C. J. 374: (1973) 2 S. C. C. 358 : (1972) 1 S. C. W. R. 961 : A. I. R. 1972 S. C. 2299 ; *Mohammed Sulaiman* v. *Mohideen Thambi*, (1971) 84 L. W. 252.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, dated 7th July, 1978, and passed in Appeal Suit No. 119 of 1976, preferred against the decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 103 of 1976.

K. Raman, for Appellant.

K. Subramaniam, for Respondent.

The Court delivered the following

JUDGMENT:—The defendant in O S. No. 103 of 1976 on the file of the District Munsif of Kumbakonam is the appellant in teis second appeal. The respondent herein is the plaintiff in the suit. The plaintiff laid the suit for a bare permanent injunction. The averments in the plaint proceeded on the basis that the property belongs to him ancestrally and even otherwise he has prescribed title to it by adverse possession. The defendant contested the suit by stating that he has purchased the suit property under the sale deed dated 5th June, 1961 from one Somu Samban, the maternal uncle of the plaintiff. The further case of the defendant is that his vendor Somu Samban was the exclusive owner of the suit property by virtue of his purchase under a sale deed dated 23rd June, 1948 from one G. Ramalingam. It is needless to point out that on the above contentions put forth by the parties, it is not possible to grant relief to the plaintiff with regard to the possession claimed by him without adjudicating the question as to whether the defendant has got title to the suit property or not. The first Court took up the question of possession alone and found, on as assessment of the materials placed in the case, that the defendant was in possession of the suit property on the date of the suit and hence the plaintiff is not entitled to the injunction as prayed for by him and accordingly dismissed the suit. The plaintiff appealed and the lower appellate Court chose to come to a different conclusion on the question of possession and holding that the plaintiff was is possession and the defendant was not in possession, allowed the appeal with costs and decreed the suit of the plaintiff as prayed for with costs. Hence the second appeal by the defendant.

2. As the time of admission of the second appeal, the following substantial question of law was mooted out for consideration.

> "Whether it was open to the lower appellate Court to grant an injunction is regard to vacant site when the plaintiff had not proved his title to the said site?."

Mr. Ananthasivam, learned counsel appearing for the appellant would submit that the lower appellate Court has not given any finding upholding either the title of the plaintiff or negativing the title of the defendant and on the only finding which finding is again being impeached by the learned counsel for the appellant-that the plaintiff is in possession,

the lower appellate Court has chosen to decree the suit of the plaintiff. The learned counsel further submits that there must be a finding by the lower appellate Court that the plaintiff has title to the suit property either by deed or by prescription of the same by adverse possession and if the plaintiff wants to succeed in obtaining a decree for permanent injunction on the sole ground of his possession, there must be a further finding that the defendant is not the lawful owner of the suit property as claimed by him.

3. Nobody can dispute the general principle that a person in peaceful possession is entitled to be maintained in possession against all but the true owner and the suit by such a person for an injunction against any other person threatening to dispossess him is maintainable and there could be an investigation of his cause and relief granted if there is a warrant for it on facts. As pointed out by the Supreme Court in *M. Kallappa Setty* v. *M. V. Lakshminarayana Rao*[1], the plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. The propriety of protecting the possession of the plaintiff, who has failed to establish his title, when the defendant's plea of title has been rejected, came up for consideration before Gokulakrishnan, J., in *Mohammed Sulaiman* v. *Mohideen Thambi*[2], and the learned Judge found, that in that case both the Courts below concurrently found that the defendants have neither title to nor possession of the suit properties and in the said circumstances when the plaintiffs are in possession of the suit properties, they are entitled to have their possession protected by a decree, of injunction.

4. In the present case, there is a dispute on the question of title to the suit property between the plaintiff and the defendant. Either it must be found that the plaintiff has title by deed or by adverse possession and if he is found to be in possession on the date of the suit, the plaintiff is entitled to have his possession protected by a decree of permanent injunction; or it must be found that the plaintiff is in possession on the date of the suit and the defendent has no title to the suit property and in that circumstance also the plaintiff's possession can be protected. On going through the judgment of the lower Appellate Court, I find that there is a glaring omission to approach the controversy in issue and find the resolution for the same keeping in mind the above principles and as stated above only on the ground that the plaintiff is in possession and the defendant is not in possession and without adjudicating the question of title one way or the other, the lower Appellate Court has chosen to decree the suit of the plaintiff. This approach and the reasoning of the lower Appellate Court do not fit in with the well-accepted principles deliniated above. This obliges me to interfere in second appeal and accordingly the second appeal is allowed and the matter A. S. No. 119 of 1976 will stand remitted to the file of the lower appellate Court for itto consider the sameafresh in thelight of the observations and the principles set out above. The parties are directed to appear before the lower Appellate Court on 30th November, 1982 for the purpose of obtaining further directions with regard to the proceedings before it. Costs will abide the results in the appeal before the lower Appellate Court. The appellant is entitled to the refund of the court-fee paid in this appeal.

R. S. —— *Second appeal allowed. and matter remitted.*

1. (1972) 1 S. C. W. R. 961 : (1973) 1 S. C. J. 374 : (1973) 2 S. C. C. 358 : A. I. R. 1972 S. C. 2299.
2. (1971) 84 L. W. 252.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Lakshmi Ammal ... *Appellant**

v.

Ramachandra Naicker ... *Respondent.*

(A) *Document—Construction of—Suit for declaration—Plea as to construction not raised in the written statement—Question of law can be considered at the stage of second appeal.*

(B) *Hindu Law—Will by father of reasonable portion of family property in favour of married daughter for maintenance—Validity.*

The construction of document is a question of law and it is not necessary to plead it. There is no question of any evidence being let in and therefore, the absence of a plea in the written statement is not fatal to its being considered at the stage of the second appeal. [*Para.* 8.]

Where a daughter was in need of some arrangement for her maintenance as she had come out of her husband's family by reason of some quarrel and properties were given to her by her father which were only a third share in a house and three items of lands of an extent of 80 cents and the provision was a reasonable one having regard to the properties belonging to the family, the transaction is on a par with alienation of family property for its benefit or necessity. The arrangement in the circumstances is not affected by the rule that a member of a joint family cannot dispose of by a will his undivided coparcenery interest. [*Para.* 6.]

Cases referred to:—

Lakshmi Chand v. *Anandi*, (1926) I. L. R. 48 All. 313 : L. R. 23 I. A. 123 : 51 M. L. J. 52: A. I. R. 1926 P. C. 54; *Appan Patra Chariar* v. *V. S. Srinivasa Chariar*, (1917) I. L. R. 40 Mad. 1122 : 32 M. L. J. 364 : 5 L. W. 544; *Venkoba Sah* v. *Ranganayaki Ammal*, (1936) 71 M. L. J. 454 : 44 L. W. 483 : A. I. R. 1936 Mad. 967; *Kuppuswami Raja* v. *Perumal Raja*, (1964) 2 M. L. J. 545 : I. L. R. (1964) Mad. 114 : 76 L. W. 741 : A. I. R. 1964 Mad. 291; *Kavuru Venkatappayya* v. *Kavuru Raghavayya*, (1950) 2 M.L.J. 466 : 63 L. W. 1006 : A. I. R. 1951 Mad. 318.

Appeal against the decree of the Court of the Subordinate Judge, Vellore in Appeal Suit No. 18 of 1980, preferred against the decree of the Court of the District Munsif, of Ranipet, in Original Suit No. 144 of 1979.

G. Jagadisa Iyer, for Appellant.

The Court delivered the following

JUDGMENT.—The defendant in O. S. No. 144 of 1977 in the Court of the District Munsif of Ranipet, is the appellant. The suit was filed for declaration of the title of the plaintiff to the suit properties and for permanent injunction. The plaintiff's case was that the suit properties were the ancestral properties belonging to him and his father, that his father was in possession and and enjoyment of the same till his death in or about 1954, that his father purported to execute a will dated 30th May, 1952 in favour of the defendant bequeathing the suit properties to be enjoyed by her after the lifetime of the plaintiff, that the defendant had not taken delivery of the properties at any time, that the suit properties were in his possession, that the will would be invalid and that in any event, he has perfected title to the same by adverse possession. The defendant filed a written statement contending that in pursuance of the will, she got title to the suit properties, that she was in possession and enjoyment in her own right, that the suit properties were her father's separate properties and not joint family property and that there is no question of the plaintiff perfecting title to suit properties by adverse possession as he was never in possession.

2. The learned District Munsif, Vellore, dismissed the suit holding that the plaintiff had no title to the suit properties that the suit properties were not ancestral properties, and that they could be the subject of a bequest in favour of the defendant. The matter was taken on appeal by the plaintiff and the learned Subordinate Judge, after examining the relevant contentions in the light of the evidence, come to the conclusion that the suit properties were ancestral properties, and that he was entitled to the relief of injunction. Treating the will to be

*S. A. No. 878 of 1981. 23*rd November*, 1981.

invalid, the learned Subordinate Judge held that the defendant could not get any title to the suit properties The second appeal has been filed by the defendant.

3. Mr. G. Jagadisa Iyer, learned counsel for the appellant, did not dispute the finding that the suit properties were the ancestral properties of the joint family consisting of the plaintiff and his father. The learned counsel, however, contended that the father of the plaintiff, who died in 1954, had executed the will or settlement marked as Exhibit B-1, dated 30th May, 1952 and that the document could in any event be considered as family settlement to which the plaintiff was a consenting party. In his submission, the transaction had to be given effect to and the defendant would be entitled to the properties covered by the document. For the respondent, the submission was that a coparcener could not have made any alienation of his undivided interest in the properties, that the alienation would be invalid and void and that, in the circumstances, the defendant would have no title to the properties. The question of consenting to such an invalid transaction would, it was submitted, be wholly immaterial. He relied, in this connection, on a decision to be referred to presently.

4. The only question that arises for consideration is whether on the footing that the suit properties are joint family properties, the document, dated 30th May, 1952 was a valid one. The plaintiff is the son of one Manickam and the defendant is the plaintiff's sister. The document dated 30th May, 1952 is drafted in the form of a will. It refers to the defendant being the daughter of the testator and declares that the property described in the schedule thereunder would be enjoyed by her without any powers of alienation and that if she died without any issue, then the property would revert to the plaintiff. If she had any issue, then the property would be absolutely enjoyed by the said issues. It is significant to note that the plaintiff has not signed the document as an attesting witness but as if he is a joint executant. It is not in dispute that the defendant, though married, had some difficulties in her married life and that therefore, she had come back to the family of her birth. The intention of Manicka was obviously to provide for the defendant because she would otherwise be without any source of maintenance.

5 I may now refer to the principles which apply to a case of this kind. In *Lakshmi Chand* v. *Anandi*[1], the Privy Council dealt with a case of two brothers having no male issue. They constituted a joint Hindu family governed by the Mitakshara law and signed a document described as an "agreement by way of will." The document provided in effect that if either party died without male issue, his widow should take a life interest in a moiety of the whole estate, and that if both parties died without male issue, the daughters of each, or their male issue, should divide the father's share. The document was registered. A few days after its execution one brother died, and his widow was entered as owner of a moiety of the estate. Subsequently the other brother sued for a declaration that the document was null and void. It was held that the document could not operate as will ; but that, as a co-sharer in a Mitakshara joint family with the consent of all his co-sharers could deal with the share to which he would be entitled on a partition, the document was an agreement entitling the widow of the deceased brother to a life interest in a moiety. Even prior to this pronouncement of the Privy Council, a Bench of this Court in *Appan Patra Chariar* v. *V. S. Srinivasa Chariar and four others*[2], held that a father in a joint Hindu family could with the consent of his adult son bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. This decision was followed by another Bench of this Court in *Venkoba Sah and another* v. *Ranganayaki Ammal and others*[3]. In that case one Sundara Pandaram and Ekambara Pandaram were undivided brothers and were the only two members of a joint Hindu family. Sundara Pandaram executed a will stating that he had requested his brother

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1. (1926) I.L.R. 48 All. 313 : 53 I.A. 123 : 31 M.L.J. 52 : A.I.R 1926 P.C. 54.
2. (1917) I.L.R. 40 Mad. 1122 : 32 M.L.J. 364 : 5 L.W. 544.
3. (1936) 71 M.L.J. 454 : 44 L.W. 483 ; A.I.R. 1936 Mad. 967.

Exambaram to act according to the directions in the will, that Ekambaram had agreed to it and that therefore Ekambaram should absolutely take all the properties after Sundaram's death. One of the directions in the will was that after the marriage of Sundaram's only daughter the brother should execute a Stridhana Deed so that the said female child herself may absolutely get the land mentioned in the first schedule from son to grandson and so on in succession and should also put her in possession of the land. In default of the brother so doing, the direction was that the daughter should take the same properties as if Sundaram had given the said properties to her as Stridhana on the very day. The will was attested by Ekambaram and was also registered. But Ekambaram mortgaged the properties which were subsequently sold to a stranger. It was held that the document was a will disposing of the property in favour of the daughter and that though the will as a will was invalid as dealing with the ancestral property yet the disposition in favour of the daughter though absolute, was valid as a family arrangement because it was a bequest by a father of a reasonable portion of the ancestral property and it was made with the consent of the sole remaining copercener. This question was again the subject-matter of consideration by a Bench, of this Court in *Kuppuswamy Raja and another* v. *Perumal Raja and nine others*[1], It was held construing a will executed by one of the two brothers of a joint Hindu family that though under Hindu law it was not competent for a member of a joint Hindu family to execute a will in regard to his share of the joint family property, if all the coperceners agree, a will so executed could be given effect to as a family arrangement.

6. It is true that until the Hindu Succession Act brought in section 30 permitting a coparcener to dispose of his own share by a will, no coparcener, not even a father, could dispose of by a will his undivided coparcenary interest. But this principle is subject to the exception that the members of a joint family can by joining together give a reasonable portion of the property to a female member. In the present case, it cannot be disputed that the female member was in need of some arrangement for her maintenance as she had come out of her husband's family by reason of some quarrel. The properties which have been given to her are only one-third share in a house and three items of land of an extent of 80 cents. The provision is so reasonable having regard to the properties belonging to the family. It cannot be stated that the co-parcener virtually alienated his undivided interest. What is prohibited is an alienation of undivided interest which would in effect be the introduction of a third party into the family. There is a case where certain specific properties were given to a female member who had to be provided for. It would be on a par with alienation of family property for its benefit or necessity. The arrangement in the present case is not affected by the rule that a member of a joint Hindu family cannot dispose of by a will his undivided coparcenary interest.

7. The learned counsel for the respondent drew my attention to a decision in *Kavur Venkatappayya* v. *Kavuru Raghavayya*[1]. In that case, the father of the plaintiff and the defendant made a gift of his separate property to the plaintiff. It was stated in the document that the property was conveyed subject to the right of residence of the author of the document and his wife. The plaintiff in that case was to take possession of the schedule property and enjoy the same with absolute powers. Thereafter, the plaintiff executed a document in 1944 conveying to the defendant the property dealt with above. It is in this context that the learned Judge referred to the well-known rule of Hindu law that a gift or devise by a coparcener is a Mitakshara family of his undivided interest in wholly invalid. I do not consider that the decision is capable of

1. I. L. R. (1964) 1 Mad. 114 : (1964) 2 M. L. J. 545 ; 76 L. W. 741 ; A. I. R. 1964 Mad. 291.

1. (1950) 2 M. L. J. 466 : 63 L. W. 1006 : A. I. R. 1951 Mad. 318.

application to the facts here. Further, the said decision has not referred to the decisions of at least two of the Division Benches rendered in *Appan Patra Chariar* v. *V. S. Srinivasa Chariar and four others*[1] and *Venkoba Sah and another* v. *Ranganayaki Ammal and others*[2].

8. The learned counsel for the respondent submitted that there was no plea regarding the document being construed as a family settlement. The construction of a document is a question of law and it is not necessary to plead it. There is no question of any evidence being let in and therefore, the absence of a plea in the written statement is not fatal to its being considered at this stage.

9. The learned counsel for the respondent further submitted that the respondent has been in possession of the properties right from his father's death in 1954 and that he has perfected title to the properties by adverse possession. The lower appellate Court has considered this aspect in paragraph 10 of its judgment and has pointed out that except the oral evidence, there was no document to show that the defendant was in possession of the properties and under the will and in the light of the discussion, it had to be found that the properties were to be enjoyed by the daughter under a family settlement. As far as the house is concerned, one would be a co-owner. The other properties were also properties with reference to which the plaintiff himself is a party to the disposition. The trial Court has referred to the evidence of the plaintiff's own witnesses going against the plaintiff's case. In these circumstances, I do not find that there is any justification in the plea of adverse possession which could be upheld. The second appeal is accordingly allowed. There will be no order as to costs.

S J. —— *Second appeal allowed.*

1. (1917) I. L. R. Mad, 1122 : 32 M. L. J. 364.
2. (1936) 71 M. L. J. 454; 44 L. W. 483.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*T. N. Singaravelu, J.*

Bapjee alias Mustafa Baig Sabib ... *Petitioner**

v.

Minor Parsonchand, represented by his mother and next friend Thakubai ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 10 (3) (a) (i) *and 14 (1)* (b)*—Petition for eviction—No discussion about age and condition of the building by Rent contrlloer—Photograph relied on by Rent Controller not properly proved—Rent Controller and Appellate Authority bound to record thier findings based on evidence—Order of eviction passed by Rent Controller and confirmed by Appellate Authority set aside—Matter remitted to Rent Controller.*

The landlord, a minor represented by his mother filed an application for eviction of the tenant in respect of a residential building under sections 10 (3) (*a*) (*i*) and 14 (1) (*b*) of Tamil Nadu Act XVIII of 1960. The rent Controller ordered eviction and this was confirned by the Appellate Authority. In revision against the order to the High Court by the tenant it was contended that the order was vitiated *inter alia* by absence of a finding with reference to the age and condition of the building which is a vital factor to be considered in assessing the *bona fides* as required by the Supreme Court decisions by the tenant.

Held: The ground under section 14 (1) (*b*) has been disposed of by the Rent Controller in just one short paragraph which describes the exhibits and there is practically no discussion about the age and condition of the building, Of course, the Rent Controller has relied on the photograph of the building. But then, this photograph itself has not been propertly proved since the photographer has not been examined. The order of the Appellate Authority is also no better in the sense that

* C. R. P. No. 3176 of 1980. *6th November*, 1981.

there is no discussion with regard to the age and condition of the building or the resources of the landlord. The Appellate Authority has merely commented on the plan and the photograph and confirmed the finding of the Rent Controller. The Courts below are bound to record their findings based on the evidence. Inasmuch as this has not been done, this is a fit case for remitting the matter to the Rent Controller. [*Para.* 2.]

Under section 10 (3) (*a*) (*i*) the landlord is bound to prove that he is not occupying any building of his own or that of the members of his family in the town or city as the case may be. This has not been done in the instant case. Therefore, even on this ground the matter has to go back to the rent controller for receiving further evidence and for proper disposal. [*Para.* 3.]

Case referred to :—

Metalware & Co. v. *Bansilal,* (1979) 2 S. C. J. 377 : (1980) 1 M. L. J. (S. C) 1 : (1979) 3 S. C. C. 398 : A. I. R. 1. 1979 S. C. 1559.

Petition under section 25 of Tamil Nadu Act XVIII of 1860 as amended by Act XXIII of 1973 to revise the order of the Sub-Court, Vellore, dated 8th October, 1980 in C. M. A. No 88 of 1979 etc.

A. R. Lakshmanan, P. Narasimha Ayyar, V. E. Alagappan and Arumukham, for Petitioner.

D. K. Srinivasagopalan. for Respondent.

The Court made the following

ORDER.—The tenant is the revision-petitioner. The respondent-landlord who was a minor represented by his mother filed an application for eviction in respect of a residential building under section 10 (3) (*a*) (*i*) and 14 (1) (*b*) of Act XVIII of 1960. The tenant resisted the application on both grounds and the Rent Controller found both the points in favour of the landlord and ordered eviction. On appeal, the Appellate Authority confirmed the findings of the Rent Controller and dismissed the appeal and hence the revision.

2. I have heard learned counsel for both the parties and perused the orders of the Courts below, as well as the pleadings in this case. So far as the ground for demolition and reconstruction under section 14 (1) (*b*) is concerned the learned counsel for the tenant submits that there is no finding either by the Rent Controller or by the Appellate Authority with reference to the age and condition of the building which is a vital factor to be taken into consideration in assessing the *bona fides* as pointed out by the Supreme Court in the decision reported in *Metalware & Co* v. *Bansilal*[1], I have perused the order of the Rent Controller. The ground under section 14 (1) (*b*) has been disposed of in just one short paragraph which describes the exhibits and there is practically no discussion about the age and condition of the building. Of course, the Rent Controller has relied on the photograph of the building Exs. A-7 and A-8. But then, this photograph itself has not been properly proved since the photographer has not been examined. That apart, ordinarily some technical evidence is usually let in examining the Surveyor or Supervisor or other expert with reference to the age and condition of the building. The order of the Appellate Authority is also no better in the sense that there is no discussion with regard to the age and condition of the building or the resources of the landlord. The Appellate Authority has merely commented on the plan and the photograph and codfirmed the finding of the Rent Controller. In my opinion, the Courts below are bound to record their findings based on the evidence. Inasmuch as this has not been done, it violates the spirit of the Supreme Court decision and therefore, this is a fit case for remitting the matter to the Rent Controller for disposing of the case afresh in the light of the discussion contained herein and in the Supreme Court decision.

3. With reference to the orher point, *viz*, requirement for own occupation under section 10 (3) (*a*) (*i*) also, the evidence is rather scanty. As stated already, the landlord was a minor represented by his mother. The case of the landlord is that this is a family house and that, in an alleged partition

1. (1979) 3 S. C. C. 398 : (1980) 1 M. L. J. (S. C) 1 : (1979) 2 S. C. J. 377 : A. I. R. 1979 S. C. 1559.

about which there is no evidence it was alloted to the elder brother of the landlord, who has given evidence as P. W. 1. No partition deed has been filed and this arrangement of partition is assailed by the other side. Under section 10 (3) (*a*) (*i*) the landlord is bound to prove that he is not occupying any building of his own or that of the members of his family in the town or city as the case may be. This has not been done. Therefore, even on this ground the matter has to go back to the Rent Controller for receiving further evidence and for proper disposal.

4. The result is, the revision petition is allowed and the order of eviction is set aside and the matter is remitted to the Rent Controller for fresh disposal in the light of the observations made above. Both the parties will be at liberty to let in oral and documentary evidence on both the points. Since this R. C. O. P., was filed in 1978 and both the parties are anxious to have an early disposal of the matter, the Rent Controller will give priority and dispose of it within three months from the date of the receipt of the record. No costs.

S. J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and G. Maheswaran, JJ.*

R. M. Muthiah ... *Petitioner**

v.

The Governmenment of Tamil Nadu, represented by its Commissioner and Secretary, Revenue Department Madras-9 and others ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), section 3 (d), *Proviso* (vi) Explanation *and* (vii) *5, 6, and 13 and Tamil Nadu Debt Relief Rules, G. O. Ms. No. 1067, dated 21st April, 1980 and 24th November, 1980—Certificate of discharge granted by the Tahsildar—Tahsildar or Deputy Tahsildar appointed as 'prescribed authority' by State Government to issue certificate of valuation—Effect of certificate issued by the authorities—Binding nature—Duty of Appellate Authority.*

A certificate as to the value of the immoveable property of the debtor is contemplated by the *Explanation* to proviso (*vi*) to section 3 (*d*) of the Tamil Nadu Debt Relief Act, 1980. The said proviso excludes from the definition of 'debtors' persons who own immoveable property other than agricultural lands, whose market value exceeds Rs 25,000. The *Explanation* under the said proviso and proviso (*vii*) say that the market value of the immoveable property or both agricultural lands and other immoveable property as the case may be, shall be estimated to be the price, which in the opinion of the authority prescribed in this behalf, such immoveable property or both the agricultural lands and other immoveable property as the case may be, would have fetched if sold in open market on the 19th April, 1980. Thus, the *Explanation* contemplates the valuation certificate being issued by an authority prescribed in that behalf. Section 13 of the Act confers on the State Government, the rule-making power for the purpose of carrying out all or any of the purposes of the

*W. P. No. 5456 of 1981 *27th January,* 1982.

Act. The rules have been framed in G. O. Ms. No. 2614 Revenue, dated 24th November, 1980; the State Government has appointed the Tahsildar or the Deputy Tahsildar of the sub-taluk as prescribed authority and the prescribed authority has to follow the guidelines issued to the Registration Department for determining the market value of the property. [*Para.* 4.]

In the present case, the certificate has been issued by the Tahsildar in whose jurisdiction the property is situate. Therefore the Appellate Authority is not justified in making an observation that the said Tahsildar is not the prescribed authority to give the value of the property as he does not have the requisite engineering knowledge and experience. Therefore the certificate cannot be rejected outright on that ground. But under proviso (*vi*) read with the *Explanation*, the market value of the property has to be determined as on 19th April, 1980. The certificate given by the Tahsildar does not say that in his opinion the value of the building was Rs. 30,000 as on 19th April, 1980. Therefore it cannot be taken as an aid to determine the value of the house property owned by respondents 4 and 5. However even if the certificate is not produced by the petitioner, the Appellate Authority can determine the value of the house owned by the respondents 4 and 5 for the purpose of finding out whether they have ceased to be 'debtors' under the proviso (*vi*) to section 3 (*d*).

[*Para.* 4.]

Petition under Article 226 of the Constitution of India for issue of writ of *certiorari* calling for records of 2nd respondent in DRAP 34/80, dated 27th June, 1981 confirming the order of the Special Tahsildar, Debt Relief (Kumbakonam in DRA 32/80 (Valangiman) dated 26th November, 1980 and quash the same.

K. Doraiswami, for Petitioner.

S. Jagadeesan, for Government Pleader, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The petitioner herein advanced a sum of Rs. 6,500 on the mortgage of a house of respondents 4 and 5 under a document, dated 5th March, 1971. After the coming into force of Tamil Nadu Act XIII of 1980, respondents 4 and 5, the mortgagors, filed an application under section 6 of the said Act, claiming a certificate of discharge from the Special Tahsildar, Debt Relief, Kumbakonam on the ground that they would come within the definition of debtor as defined in the Act, as their annuul household income was less than Rs. 4,800. The said application was resisted by the creditor, the petitioner herein, on two grounds—*viz*.: (1) that the household income of respondents 4 and 5 is more than Rs. 4,800 and therefore, they cannot claim the benefits of the Act; and (2) that the house property which is the subject-matter of the mortgage, owned by respondents 4 and 5, was more than Rs. 30,000, and therefore they cannot claim the benefits of the Act in view of the proviso (*vi*) to section 3 (*d*), which excludes persons owning immovable property (other than agricultural land) worth Rs 25,000 and more, from the definition of 'debtors'. The initial authority, the Special Tahsildar, Kumbakonam, who is the third respondent herein, granted a certificate of discharge from the mortgage as the creditor remained *ex parte*. The petitioner, however, filed an appeal before the Appellate Authority, the second respondent herein, and the second respondent gave a fresh opportunity to the petitioner as well as respondents 4 and 5 to adduce evidence in support of their respective contention. Taking advantage of the order of the Appellate Authority giving opportunity to adduce evidence, the petitioner filed a certificate from the Tahsildar, Papanasam, stating that the house property owned by respondents 4 and 5 was worth about Rs. 30,000. The Appellate Authority, however, held, after considering the evidence adduced before it, that the anual household income of respondents 4 and 5 was only Rs. 2,250 and that the house property owned by them has not been shown to be worth more than Rs. 25,000. It specifically rejected the certificate given by the Tahsildar, which was marked as Exhibit P-1 on the ground that it could not be taken into account as the Tahsildar was not the competent authority to give such a certificate and that even otherwise the certificate merely estimated the value of the property as Rs. 30,000 approximately. If the annual household income of respondents

4 and 5 is only Rs. 2,250, as found by the Appellate Authority and if they do not own a house property worth more than Rs. 25,000, they are entitled to claim the benefits of the Act, as has been held by the Appellate Authority. But, the petitioner herein seeks to question the order of the Appellate Authority on the ground that the certificate given by the Tahsildar, Papanasam (Exhibit P-1) giving the value of the house property as Rs. 30,000, should have been accepted by the Appellate Authority as he is the competent authority to give such a certificate, and the contrary opinion expressed by the Appellate Authority is incorrect. Thus, the main question that arises in this writ petition is whether the certificate, Exhibit P-1 produced by the petitioner before the Appellate Authority should have been acted upon by the Appellate Authority.

2. The Appellate Authority, as already stated, has given two reasons as to why Exhibit P-1, cannot be accepted. They are that the Tahsildar, Papanasam, is not the competent authority, to give such a certificate and the contrary opinion expressed by the Appellate Authority is incorrect.

3. The Appellate Authority, as already stated, has given two reasons as to why Exhibit P-1 cannot be accepted. They are: (1) that the Tahsildar, Papanasam, is not the competent authority to give such a certificate; and (2) that Exhibit P-1 gives only the approximate value and not the exact value of the property.

4. The certificate as to the value of the property is contemplated by the *Explanation* to proviso (*vi*) to section 3 (*d*). The said proviso excludes from the definition 'debtors' persons who own immovable property other than agricultural lands, whose market value exceeds Rs. 25,000. The *Explanation* under the said proviso and proviso (*vii*) says that the market value of the immovable property or both the agricultural lands and other immovable property, as the case may be, shall be estimated to be the price, which, in the opinion of the authority prescribed in this behalf, such immovable property or both the agricultural lands and other immovable property, as the case may be, would have fetched if sold in the open market on the 19th April, 1980. Thus the *Explanation* contemplates the valuation certificate being issued by an authority prescribed in that behalf. Section 13 of the Act confers on the State Government, the rule making power for the purpose of carrying out all or any of the purposes of the Act. The rules have been framed in G. O. Ms. No. 1067, Revenue, dated 21st April, 1980, under section 13, and those rnles are called the Tamil Nadu Debt Relief Rules, 1980. Those rules enable the concerned Tahsildar to give a certificate of discharge under section 5 or under section 6. They do not prescribe any authority to issue the certificate of valuation for the purpose of of section 3 (*e*) proviso (*vi*). However, it is seen that by G. O. Ms. No. 2614. Revenue, dated 24th November, 1980, the State Government has appointed the Tahsildar or the Deputy Tahsildar of the sub-taluk as the prescribed authority, and the prescribed authority has to follow the guidelines issued to the Registration department for determining the market value of the property. In this case, the certificate, Exhibit P-1, has been given by the Tahsildar, Papanasam, in whose jurisdiction the property is situate. Therefore, the Appellate Authority is not justified in making an observation that the said Tahsildar is not the prescribed authority to give the value of the property as he does not have the requisite engineering knowledge and experience. Therefore, the certificate, Exhibit P-1 cannot be rejected on that ground outright However, we find there is another obstacle in relying on that certificate. The certificate merely says that the house owned by respondents 4 and 5 is, in the opinion of the Tahsildar, worth about Rs. 30,000. But, under proviso (*vi*) read with the *Explanation*, the market value of the property has to be determined as on 19th April, 1980. The certificate given by the Tahsildar, Exhibit P-1 does not say that in his opinion the value of the building was Rs. 30,000, as on 19th April, 1980. Therefore, Exhibit P-1 cannot be taken as an aid to determine the value of the house property owned by respondents 4 and 5. However, even if the certificate is not

produced by the petitioner, the Appellate Authority can determine the value of the house property owned by respondents 4 and 5, for the purpose of finding out whether they have ceased to be debtors under the proviso (*vi*) to section 3 (*d*). Since the Appellate Authority has not attempted to determine the value of the house property of respondents 4 and 5 and as it merely rejects the certificate given by the Tahsildar as of no value, the order of the appellate authority has to be set aside with a direction to him to determine the market value of the house property of respondents 4 and 5 as on 19th April, 1980.

4. The writ petition is, therefore, allowed and the order of the appellate authority is quashed with a direction to consider the petitioner's appeal afresh after giving an opportunity to both parties to adduce evidence as regards the market value of the property, with reference to the provision in section 3 (*d*) proviso (*vi*) read with the *Explanation*. No costs.

R S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam and G. Maheswaran, JJ.*

T. S. Kothandaraman and another ... *Petitioners**

v.

Sub-Collector, Mettur and another ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980) (as amended by Tamil Nadu Act X of 1981), section 3 (d), *Provisos* (v) (vi) *and* (vii); *and section 4—Interpretation of proviso* (v), (vi) *and* (vii) *of section 3* (d)—*Provisos act on three different sets of individuals—Need for harmonious construction—Promissory note debt covered by section 4—Tahsildar or the other authorities held not enabled to discharge —Civil Court alone to decide.*

Giving a harmonious construction to provisos (*v*), (*vi*) and (*vii*) of section 3 (*d*) of the Tamil Nadu Act (XIII of 1980) and reading them conjointly, the only conclusion possible is that the provisos act on different sets of individuals and not on one and the same set of persons. If a person holds only agricultural lands, the proviso (*v*) operates in his case and the test to be adopted is to see whether he owns 10 acres of unirrigated land or 5 acres of irrigated land. If by adopting that test he is found to come within the scope of the Act, then there is no question of his being subjected to other tests which have been set out in provisos (*vi*) and (*vii*). Similarly, if a person holds immovable properties, the market value of which exceeds Rs. 25,000, he will stand excluded under proviso (*vi*). Proviso (*vii*) is intended to apply to persons who own both agricultural lands and other immovable property, the market value of both of which exceeds Rs. 25,000; obviously this provision will not apply to a person who holds only agricultural lands or only immovable properties to whom provisos (*v*) and (*vi*) will have to apply; it applies only to persons who own both agricultural lands and other immovable properties. [*Para. 12.*]

*W. P. No. 10316 of 1981. 15*th February*, 1982.

Even though a promissory note debt is covered by section 4 of Tamil Nadu Act XIII of 1980, the Tahsildar or other authorities constituted under the Act have not been specifically enabled to discharge a promissory note debt by giving a certificate of discharge. No doubt section 4 (1) says that no suit or proceeding could be filed against a debtor coming within the definition of the Act in any civil Court and even if a suit has been filed before the commencement of the Act, the suit will stand stayed. But before a suit is held as not maintainable or held abated, it is the civil Court which has to find as to whether the defendant in the suit is a debtor as defined in the Act. [*Para.* 14.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in K. Dis. No. 726/81 E. dated 8th September, 1981, on the file of the 1st respondent herein and to quash the same.

R. Mathrubutham, for Petitioners.

P. Jayaraman and *S. Jagadeesan*, for Government Pleader, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The petitioners herein have prayed for the issue of a writ of *certiorari* to quash the order of the first respondent dated 8th September, 1981, allowing the second respondent's appeal and setting aside the orders of the Special Tahsildar, Debt Relief, Mettur, dated 31st October, 1980, holding that the petitioners are entitled to the benefits of Tamil Nadu Act XIII of 1980.

2. The petitioners herein have taken a mortgage loan of Rs. 20,000 from the second respondent on 8th April, 1974, and the said mortgage debt was outstanding on the date of the commencement of Tamil Nadu Act XIII of 1980. Taking advantage of the provisions of the said Act, the petitioners filed an application under section 6 of the said Act before the Special Tahsildar (Debt Relief), Mettur, for a Certificate of redemption alleging that their annual household income is less than Rs. 4,800 and that therefore, they are entitled to the benefits of the Act. The said application was opposed by the second respondent on the ground that the petitioners' annual household income was more than Rs. 4,800. The Special Tahsildar by his order, dated, 31st October, 1980 found that the annual household income of the petitioners does not exceed Rs. 4,800 and therefore, they are entitled to a certificate of redemption. By the same order he also directed an unsecured debt of Rs. 7,500 due by the petitioners to the second respondent on a promissory note to stand discharged.

3. There was an appeal by the second respondent to the first respondent herein against the said order of the Special Tahsildar. When the said appeal was pending, the definition of 'debtor' under section 3 (*d*) stood amended by the Tamil Nadu Act X of 1981. By this amendment, a proviso has been introduced to section 3 (*d*) excluding certain persons from the definition of debtors. The provisos (*i*) to (*iv*) are not relevant in this case. The provisos (*v*), (*vi*) and (*vii*) are relevant for the purpose of the present discussion and those provisos are extracted below :

"(*v*) Whether individually or jointly owns in this State or elsewhere agricultural lands exceeding ten acres of unirrigated lands or five acres irrigateed lands (whether irrigated from a Government source or a private source) ;

Explanation: Where any person owns both irrigated and unirrigated lands, for the purpose of calculating under proviso (*v*) the extent of lands owned by him, one acre of irrigated land shall be deemed to be equal to two acres of unirrigated land; or

(*vi*) whether individually or jointly owns in this State or elsewhere any other immovable property (other than agricultural lands), the market value of which exceeds twenty-five thousand rupees.

(*vii*) whether individually or jointly owns in this State or elsewhere both agricultural lands and other immovable property,

the market value of the both such agricultural lands and other immovable property exceeds twenty-five thousand rupees.

Explanation.—For the purpose of provisos (*vi*) and (*vii*), the market value of the immovable property of both the agricultural land and other immovable property, as the case may be shall be estimated to be the price, which in the opinion of the authority prescribed in this behalf such immovable property or both the agricultural lands and other immovable property, as the case may be would have fetched if sold in the open market on the 19th April, 1980".

4. At the stage of the appeal, the Appellate Authority, the first respondent, taking note of the fact that the petitioners own 4.02 acres of irrigated dry lands, held that as the petitioners are not small farmers, they are not entitled to the benefits of Tamil Nadu Act XIII of 1980. Obviously, the reasoning given by the first respondent that the petitioners who are not small farmers as they hold an extent of 4.02 acres of irrigated dry lands are not eligible for the relief under Tamil Nadu Act XIII of 1980 is untenable. If the petitioners are not small farmers, in respect of the debts they are not entitled to claim benefits under Tamil Nadu Act XXXI of 1976 and therefore, they will straightway come within the scope of Tamil Nadu Act XIII of 1980 provided: (*i*) their annual household income is not shown to be more than Rs. 4,800; and (*ii*) they also do not come within the exceptions set out in the provisos above referred to. Therefore, the order of the first respondent cannot as such be sustained and the matter has to be remitted back to the Appellate Authority for consideration of the question as to whether the petitioners' annual household income was more than Rs. 4,800 or not as on 31st December, 1979 for the purpose of finding out whether they are entitled to the benefits of Tamil Nadu Act XIII of 1980 or not.

5. However, the learned counsel for the second respondent contends that even though the petitioners are found to own 4.02 acres of irrigated dry lands which is less than the limit of land prescribed in proviso (*v*), the said lands held by the petitioners has been shown to be worth more than Rs. 40,000 in value in the annexure to the mortgage deed itself for the purpose of the stamp duty, and therefore, the petitioners as persons owning agricultural lands worth more than Rs. 25,000 as contemplated in proviso (*vii*) will stand excluded by the said proviso to section 3 (*d*). According to the learned counsel for the second respondent. though under proviso (*v*), the petitioners having regard to the extent of land owned by them may be taken to be persons coming within the purview of the Act, under proviso (*vii*) they will have to be taken out of the purview of the Act, having regard to the fact their agricultural lands are worth more than Rs. 25,000.

6. The learned counsel for the petitioners would contend that once the petitioners are found to come within the purview of the Act as the extent of land held by them was less than 10 acres of unirrigated land or 5 acres of irrigated lands as provided in proviso (*v*), there is no question of their being excluded from the purview of the Act with reference to the other provisos. According to the learned counsel for the petitioners, the provisos (*v*), (*vi*) and (*vii*) should be understood to operate independently and they cannot be applied cumulatively, that the persons coming under these three provisos should be taken as three separate and independent groups and if by application of one proviso one group comes within the purview of the Act, the benefit of the Act cannot be denied to that group merely because the group is likely to fall within the other provisos. The learned counsel also submits that the provisos should be read harmoniously so as to avoid the conflict or as operating on the same set of persons. Thus the main question is as to what is the relative scope of the three provisos set out above.

7. There is no dispute that though the provisos were introduced by Tamil Nadu Act X of 1981, they have to be applied to the petitioner's case as their appeal was pending before the Appellate Authority. Even otherwise the Act has been specifically made retrospective in operation from 19th April, 1980. It is for this reason the applicability of the proviso to section 3 (*d*) which have

been introduced by Act X of 1981 to the petitioners' case has not been disputed before us by the learned counsel for the petitioners. The learned counsel for the petitioners would say that since the Appellate Authority has found that the petitioners have got only 4.02 acres of irrigated dry lands well within the limits set out in proviso (*v*) they should be taken to be entitled to come within the scope of the Act and if they established that their annual household income was less than Rs. 4,800 they are entitled to claim the benefits of the Act and, therefore, the only thing that has to be considered by the Appellate Authority is to find out whether the petitioners' annual household income was Rs, 4,800 or not and dispose of the appeal based on the said finding.

8. On the other hand, the learned counsel for the second respondent submits that even though the extent of land held by the petitioners is less than the limit prescribed in proviso (*v*), the lands are worth, even according to the valuation given by the petitioners in the mortgage deed, more than Rs. 25,000 and that will take the petitioners out of the Act under proviso (*vii*). The question is whether the petitioners, who admittedly do not stand excluded by proviso (*v*) can be taken to have been excluded by the application of proviso (*vii*).

9. On a due consideration of the matter, we are of the view that the three provisos referred to above have separate and independent operation on three different groups of people. Proviso (*v*) deals with the extent of agricultural lands held by a person and provides the extent of lands as a measure for finding out whether that person will come under the purview of the Act or not. This proviso does not refer to the value of the agricultural lands, and the worth of the agricultural lands has not been considered as being material for the application of proviso (*v*).

10. Proviso (*vi*) provides that if persons, either individually or jointly, own any other immovable property other than agricultural lands and if the market value of such property exceeds Rs. 25,000, then those persons will stand excluded from the purview of the Act. This proviso specifically refers to persons owning immovable property other than agricultural lands. Having regard to the language used in the proviso it can only refer to persons owning immovable property other than agricultural lands.

11. Proviso (*vii*), however, deals with persons who either individually or jointly own both agricultural lands or other immovable property, the market value of which exceeds Rs. 25,000.

12. Having regard to the object of the Act and the language used in the respective provisos we are of the opinion that the provisos are intended to apply to three different sets of persons : (1) persons owning exclusively agricultural lands; (2) persons owning exclusively immovable properties other than agricultural lands; and (3) persons owning agricultural lands as well as other immovable properties. So far as persons owning exclusively agricultural lands; the Legislature has thought it fit to use a different measure, that is, to fix a ceiling on one's extent of holding to determine whether he is to be brought within the Act or not and has fixed 10 acres of unirrigated land and 5 acres of irrigated land as a limit for the purpose of exclusion from the provisions of the Act. In respect of persons owning other immovable property, other than agricultural lands or both immovable property and other agricultural lands, the limit of Rs. 25,000 has been fixed as the criterion for the purpose of excluding those persons from the purview of the Act. In our view, the construction which we have adopted of the provisos (*v*), (*vi*) and (*vii*) not only gives some effect to the policy and object of the Act, but is also a harmonious construction. When the three provisos are intended to serve the same purpose of finding out whether a particular person comes within the purview of the Act or not the Legislature could not have provided different and inconsistent tests in respect of the same persons. Therefore, giving a harmonious construction to the said provisos and reading them conjointly, the only conclusion possible is that the provisos act on different sets of individuals and not on one and the same set of persons. If a person holds only agricultural lands, the proviso (*v*) operates in his case and the test to be adopted is to see whether he owns 10 acres of unirrigated land

or 5 acres of irrigated land. If by adopting that test he is found to come within the seope of the Act, then there is no question of his being subjected to other tests which have been set out in provisos (*vi*) and (*vii*). Similarly, if a person holds immovable properties, the market value of which exceeds Rs. 25,000, he will stand excluded under proviso (*vi*). Proviso (*vii*), is intended to apply, as already stated, to persons who own both agricultural lands and other immovable property, the market value of both of which exceeds Rs. 25,000. Obviously this provision will not apply to a person who holds either only agricultural land or only immovable properties to whom provisos (*v*) and (*vi*) will have to apply and, only to persons who own both agricultural lands and other immovable property this proviso has to be applied. Therefore, in this light we are not inclined to agree with the contention advanced on behalf of the second respondent that since the petitioners' agricultural lands are worth more than Rs. 25,000 they have to be brought within the proviso (*vii*), for, proviso (*vii*) as we have already said, applies only to persons who own both agricultural lands and other immovable properties. The learned counsel for the second respondent would say that the petitioners, apart from owning agricultural lands also own some other immovable property. Now that we are remitting the matter to the first respondent for a fresh consideration in the light of the opinion expressed by us as to the relative scope of proviso (*v*), (*vi*) and (*vii*), the Appellate Authority has to consider as to which of the three provisos applies to the petitioners after ascertaining their properties.

13. The order of the Appellate Authority, first respondent, dated 8th September, 1981, has, therefore, to be set aside with a direction to him to consider the matter afresh after considering the question as to what are the properties owned by the petitioners; both agricultural lands and other immovable properties, and decide the question as to the petitioners' entitlement to the benefits of the Act in the light of the amended provision.

14. At this stage we have to mention that the order of the Special Tahsildar which is the subject-matter of the appeal before the first respondent also directs the discharge of the promissory note debt of Rs. 7,500, assuming that the Act enables him to discharge the promissory note debt. Even though the promissory note debt is covered by section 4 of Tamil Nadu Act XIII of 1980 the Tahsildar or the other authorities constituted under the Act have not been specifically enabled to discharge a promissory note debt by giving a certificate of discharge. No doubt section 4 (1) says that no suit or proceeding could be filed against a debtor coming within the definition of the Act in any civil Court and even if a suit has been filed before the commencement of the Act, the suit will stand stayed. But before a suit is held as not maintainable or held abated, it is the civil Court which has to find as to whether the defendant in the suit is a debtor as defined in the Act. Therefore, as and when the second respondent files a suit against the petitioner for recovery of the promissory note debt, the petitioners can put forward their claim that they are entitled to the benefits of Tamil Nadu Act XIII of 1980 and their entitlement to the benefits of the Act has to be considered by the civil Court. Therefore, the direction of the Tahsildar discharging the promissory note debt cannot be sustained in law, but as that order is not before us, we merely express our opinion so that the Appellate Authority will modify the order of the Tahsildar suitably.

15. As it is stated that the appeal was filed long before the amendment made to Act XIII of 1980 by Tamil Nadu Act, X of 1981, the second respondent herein who is the appellant before the first respondent wants permission to file additional grounds based on the amended provision. The permission is granted.

16. The order of the first respondent is set aside and the matter is remitted to the first respondent for fresh disposal in the light of the observations above. No costs.

S. J. —— *Petition allowed and matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*R. Sengottuvelan, J.*

M. Ramaswamy Padayachi ... *Petitioner**

and

K. Vijendran by Power agent K. Venkataraman ... *Respondent.*

and

K. Kandaswamy Padayachi ... *Petitioner.*

v.

K. Venkataraman ... *Respondent.*

Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), section 6-B—Revenue Court passing order of eviction against tenant straightway – No time given to tenant to deposit arrears of rent—Validity of order.

Revision petitions were filed by two tenants of the same landlord against orders of eviction straightway passed by the Special Deputy Collector without giving time to the tenants to deposit the arrears claimed in the petitions. The High Court had previously ruled to the effect that the Revenue Court in passing an order of eviction on the basis of the arrears of rent must first pass an order determining the arrears and then grant time to the tenant to deposit the arrears and, only in cases of default, an order of eviction should be passed. But the Supreme Court in *Chinnamarkathian* v. *Ayyavoo*, (1982) 1 M. L. J. (S. C.) 17 : (1982) 1 S. C J. 142, held that it is left to the discretion of the Revenue Divisional Officer to grant time to the cultivating tenant or deny him that opportunity.

In view of the decision of the Supreme Court the orders passed by the Special Deputy Collector in both the cases cannot be assailed.

No doubt, both orders were passed *ex parte*. The remedy by way of setting aside the *ex parte* order under the law is available to the tenants and they can pursue the same, if so advised. [*Para.* 3.]

*C. R. P. Nos. 88 and 89 of 1981. 13*th August*, 1982.

Case referred to :

Chinnamarkathian v. *Ayyavoo*, (1982) 1 M. L. J. (S. C.) 17 : (1982) 1 S. C. J. 142 : (1982) 1 S. C. C. 159 : A. I. R. 1982 S. C. 137.

Petitions under section 6-B of the Tamil Nadu Cultivating Tenants Protection Act, 1955, praying the High Court to revise the order of the Revenue Court, Thanjavur, dated 2nd October, 1980, and made in P. No 152 and 165 of 1980 respectively.

M. Kalyanasundaram, for Petitioner.

N. Vanchinathan, for Respondent.

The Court made the following

ORDER.—Both these civil revision petitions are filed by two tenants of the same landlord against the orders passed by the Special Deputy Collector, passing an order of eviction straightway without giving time to deposit arrears claimed in the petitions. These civil revision petitions have been entertained by this Court in view of the decision of this Court to the effect that the Revenue Court in passing an order of eviction on the basis of arrears of rent must first pass an order determining the arrears and then grant time to the tenant to deposit the arrears and only in case of default an order of eviction should be passed. But the Supreme Court has observed in *Chinnamarkathian* v. *Ayyavoo*[1]. "Now as I read sub-section (4) (of section 3 of Tamil Nadu Act XXV of 1955), it gives the Revenue Divisional Officer power either to allow the application of the landlord or to dismiss it after he has held a summary enquiry into the matter. If the application is allowed an order of eviction has to be passed. If it is dismissed the proceedings again come to an end. However if the ground of eviction is non-payment of rent, the Revenue Divisional Officer is clothed with power to allow the cultivating tenant to deposit the arrears and costs as directed. The power is discretionary and, while exercising the same, it is not incumbent on the Revenue Divisional Officer to grant time. If the legislature intended to make it

1. (1982) 1 M. L. J. (S. C.) 17 : (1982) 1 S. C. J. 142 : (1982) 1 S C. C. 159: A.I.R. 1982 S. C. 137.

obligatory on the part of the Revenue Divisional Officer to fix a time for deposit of the arrears in all cases covered by clause (*a*) or clause (*aa*) of sub-section (2) there is no reason why it should have used the word may in relation to the grant of time. Support for this view is available in clauses (*b*) of sub-section (3) wherein, the legislature has directed :

> "If the Court finds that any sum is due it shall allow the cultivating tenant such time as it may consider just and reasonable.................."

In this situation it must be held that while the opportunity of depositing the arrears of rent cannot be denied to a cultivating tenant during the course of proceedings under sub-section (3), the same is not available as of right under clause (*b*) of sub-section (4). The difference in the language used by the legislature is significant and not without purpose. The intention of the legislature appears to be that normally a defaulting tenant must seek the help of the Court all by himself and that if he does so he must be protected but that a defaulting tenant who waits for payment of rent till he is sought to be evicted by the landlord is not necessarily entitled to the same protection. Circumstances may exist which may place him at par with a tenant covered by sub-section (3) but then it may not necessarily be so. That is why it is left to the discretion of the Revenue Divisional Officer to grant time to the cultivating tenant or to deny him that opportunity."

2. In view of the above decision of the Supreme Court, the orders passed by the Special Deputy Collector in both the cases cannot be assailed.

3 No doubt, both orders are passed *ex parte*. The remedy by way of setting aside the *ex parte*. order under law is available to the tenants and they can pursue the same, if so advised. I am not expressing any opinion on the question of limitation with reference to such an application.

4. In the result these two civil revision petitions are dismissed. However, there will be no orders as to costs.

R. S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Jayammal ... *Petitioner**

v.

Valliammal ... *Respondent.*

Civil Procedure Code (V of 1908), Order 5, rule 9 (4) (iii)—*Sub-rule (4) mandatory—Contemplates personal service—Service of notice in execution on husband of petitioner not enough.*

It should be noted that sub-rule (4) of rule 9 of Order 5, Civil Procedure Code, uses the language 'notwithstanding'. Therefore it is mandatory in its terms. It contemplates 'personal service'. [*Para.* 4.]

Service of notice of execution on the husband of the petitioner even assuming there was such service, is not enough having regard to the mandatory terms of Order 5, rule 9 (4) (*iii*). [*Para.* 4.]

Cases referred to:—

Narendra Nath v. *Sailendra Krishna Sahu*, A. I. R. 1967 Cal. 185 ; *M. L. and B. Corporation* v. *Bhutnath*, (1965) 1 S. C. J. 109 : (1964) 3 S. C. R. 495 : A. I. R. 1964 S. C. 1336.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chengalpattu, dated 24th August, 1981 and made in C. M. A. No. 15 of 1980 (S. A. No. 140 of 1977 in E. P. No. 8 of 1973, D. M. C., Chengalpattu).

Aruna Jagadeesan, for Petitioner.

P. Veeraraghavan, for Respondent.

The Court made the following

ORDER —The short question that arises for consideration in this revision is whether

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*C. R. P. No. 2979 of 1981. *13th September*, 1982.

the revision pertitioner had notice in execution. Both parties tried their level best to establish their stand because it was well-settled in law that failure to serve notice in execution would vitiate the entire sale. Pursuant to the final decree on a mortgage, the property was brought to sale and the sale had taken place. Thereafter it was contended on behalf of revision petitioner that there was no service of summons on her as required under Order 5, rule 9 (4) (*iii*) of the Code of Civil Procedure, while it was contended on behalf of the purchaser that there has been proper service since service had been effected on the husband of the petitioner herein which was permissible as per the provisions of Order 5, rule 15 of the Code of Civil Procedure. The executing Court found that the service effected on the husband is not in accordance with Order 5, rule 9 (4) (*iii*), Civil Procedure Code, which, contemplates personal service. Therefore service on the husband would not be tantamount to service in law. He accordingly allowed the application. Aggrieved by the same, the matter was taken by the decreeholder in appeal and the Appellate Court was of the view that Order 5, rule 9(4) (*iii*), Civil Procedure Code, had been repealed and therefore, he found that the procedure prescribed under Order 5, rule 15 can be adopted and consequently he held that the service was proper. Accordingly he reversed the finding of the Executing Court. Thus, the revision.

2. The argument advanced on behalf of the revision petitioner is two-fold. (1) There has been no personal service on the petitioner as required under Order 5, rule 9(4) (*iii*) of the Code of Civil Procedure and the procedure prescribed under Order 5, rule 15, Civil Procedure Code would apply to proceedings other than those which are contemplated under sub-rule 4 of Order 5, rule 9, Civil Procedure Code and (2). There has been an endorsement made by the bailiff at the time to return of summons, only to suit his convenience. Hence for both these reasons, the order of the lower appellate Court is liable to be set aside.

3. In opposition to this, the learned counsel for the respondent would submit that once the Courts below have found that there has been a proper service, this Court exercising revisional jurisdiction cannot interfere with that finding as laid down in *Narendra Nath* v. *Sailendra Krishna Saha*[1], and *M. L.* and *B. Corporation* v. *Bhutnath*[2]. The other point that is argued before me is that it was not the case of the wife that the service on the husband would not constitute proper service

4. I have given my careful consideration to the above arguments. It is true that if there has been proper service of summons and the Courts below have in fact found that there has been such a service, I am not going to interfere in revisional jurisdiction under section 115 of the Code of Civil Procedure. To that proposition of law which is based upon the decisions in *Narendra Nath* v. *Sailendra Krishna Saha*[1], and *M. L. and B. Corporation* v. *Bhutnath*[2], there can be no demur whatsoever. But in this case I have grave doubts as to whether there was service of summons. When I say tha I have grave doubt, that is borne out by a mere perusal of the endorsement made by the bailiff in the case which I may do well if I extract the same in Tamil itself.

"இதில் கண்ட 2-ம் பிரதிவாதி தற்சமயம் ஆஜர் இல்லாததினால் ஷை 2-ம் பிரதிவாதி எனக்கு சம்சாரமான படியாலும், நாங்கள் ஏக குடும்பமாய் வசித்து வருவதாலும் ஷை யாருக்கு வந்த நகல் நோட்டீசை ஷை 2-ம் பிரதிவாதியின் புருஷனாகிய நான் ஷை 2-ம் பிரதிவாதியின் நகல் நோட்டீசை பெற்றுக் கொண்டு இதில் 2-ம் பிரதிவாதிக்காக கையெழுத்து வைத்திருக்கிறேன்".

The above endorsement, first of all appears to be very curious. In that the husband is claimed to say that the judgment-debtor happens to be his wife and she is living with him and further he would accept summons on her behalf. These recitals, in my view,

1. A. I. R. 1967. Cal. 185.
2. (1965) 1 S. C. J. 109 : (1964) 3 S. C. R. 495: A. I. R. 1964 S. C. 1336.

are tell—tale recitals to which no credence could be given. Then again, the same recitals are found when the bailiff submits return of the summons to the office. Therefore I am of the view that even the husband of the petitioner herein has not been served. Assuming that the husband of the petitioner has been served, the learned District Judge has incorrectly applied the provisions of law. The correct provision that has to be made applicable is Order 5, rule 9 (4) (*iii*), Code of Civil Procedure, which reads as follows :

> "*Rule 9 (4).* Notwithstanding anything contained in sub-rule (1) where proceedings in Court are taken for :
>
> ....
>
> (*iii*) bringing to sale any property in execution of a decree or order of Court, notices shall be served only in the manner provided for in sub-clause (2)".

It should be noted that this sub-rule 4 used the language 'notwithstanding'. Therefore it is mandatory in its terms. This is not a distinction with regard to the manner of service as is agreed on behalf of the respondent. On the contrary, it contemplates 'personal service'. That will be illustrated by a case of contempt of Court because the alleged contemner will have to be present on the date fixed in the summons. Therefore it is not another mode of service to be taken on any adult member of the family as contemplated under Order 5, rule 15, Civil Procedure Code. But what is required is 'personal service'. Therefore, assuming that the husband had been served, though I have found it to the contrary, this is not a case in which it will be open to the decree-holder or the auction purchaser to contend that the service on the husband of the petitioner is enough having regard to the mandatory terms of Order 5, rule 9 (4) (*iii*), Civil Procedure Code. Therefore on this point I agree with the learned District Munsif. Accordingly the order of the District Judge is set aside and that of the Executing Court is restored. However, I make it clear that the sale in so far as the share of the petitioner is concerned alone is set aside. Civil Revision Petition is allowed. There will be no order as to costs.

S. J. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

R. Sambandam ... *Petitioner**

v.

G. Chidambaram Pillai and others ... *Respondents.*

Civil Procedure Code (V of 1908) section 97—Applicability—Suit for division of plaint schedule properties by metes and bounds—Item 11 excluded—A preliminary compromise decree passed—Decree directing the removal of superstructure—Petition for final decree—Appointment of Commissioner made —28th defendant who remained ex-parte *at the trial stage applying for allotment of item 14 of the plaint schedule to his share—Preliminary decree held to have become final—Petition dismissed.*

Section 97 of the Code of Civil Procedure states that where any party aggrieved by a preliminary decree does not appeal from such decree, he is precluded from disputing its correctness in any appeal that may be preferred from the final decree. Admittedly the 28th defendant who had built a superstructure on item 14 of the plaint-schedule property elonging to the sharers had remained *ex parte*, and had not preferred any appeal against the preliminary decree directing removal of superstructure built on item 14 and allotting item No. 14 to the sharers. Therefore, a preliminary decree unless appealed against, will be a final decision of the Court passing that decree. As long as the preliminary decree has not been altered or modified or set aside, the

*C. R. P. No. 1595 of 1980. *4th February*, 1982.

revision-petitioner cannot ask for the allotment of the property to him over which he was put up the superstructure which has been directed to be removed by the preliminary decree passed by the Court. [*Para.* 3.]

Case's referred to:—

Basavayya v. *Guruvayya*, (1951) 2 M. L. J. 176 : I. L. R. (1952) Mad. 173 : 64 L W. 669 : A. I. R. 1951 Mad. 938 ; *C. Vasantha* v. *S. C. Pandian*, : (1978) 1 M. L. J. 1 : 91 L. W. 139 ; *Venkata Reddy* v. *Bathi Reddy*, (1963) 2 M. L. J. (S. C.) 126 : (1963) 2 An. W. R. (S. C.) 126 : (1963) 2 S. C. J. 577: A. I. R. 1963 S. C. 992 ; *A. C. C. Limited* v. *V. Ramakrishna*, I. L. R. (1965) 1 Mad. 237 : 77 L. W. 659: A. I. R. 1965 Mad. 318.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Mayuram, dated 6th March, 1980, and made in I. A. No. 1207 of 1979 in O. S. No. 131 of 1971.

G. Subramaniam, for Petitioner.

N. Sankara Vadivel, for Respondents.

The Court made the following

ORDER.—This civil revision petition is against the order of the learned Subordinate Judge, Mayuram, rendered in I. A. No. 1207 of 1979 on his file. The revision petitioner was the 28th defendant in the suit O. S. No. 131 of 1971 out of which the said interlocutory application arose. The respondents/plaintiffs filed a suit for division of the plaint schedule properties, except item No. 11, by metes and bounds after removal of the superstructure in item No. 14 of the plaint schedule properties. A preliminary decree was passed in terms of a compromise petition filed by the parties who were present. The decree directed *inter alia* removal of superstructure built on item 14 of the plaint schedule property. A petition for final decree was filed by the plaintiff for appointment of a Commissioner and division of the properties in accordance with the preliminary decree. In that final decree proceedings, the 28th defendant, who remained *ex parte* at the trial stage, applied in I. A. No. 1207 of 1979 out of which this civil revision petition arises for allotment of item 14 of the suit properties to his share. His contention was that he has built a superstructure valued at Rs. 20,000 and is also running a rice mill and if the building is demolished, he would be put to irreparable loss. The respondents/plaintiffs is their answer refuted the allegation that the value of the building was about Rs 20,000 and contended that the site on which the superstructure was built is a valuable property and has to be allotted after removal of the superstructure. The Subordinate Judge was of the view that the preliminary decree passed by the Court had become final and dismissed the petition. The 28th defendant challenges that order in this civil revision petition.

2. Learned counsel, Mr. G. Subramanian, for the revision petitioner contended that the claim of the revision petitioner for allotment of item 14 in the plaint schedule is only in the nature of a claim for equity and that the question of actual allotment of the property arises only at the stage of final decree and the party who desires a particular mode of allotment should approach only at the stage of final decree. In support, the learned counsel relied on a Full Bench decision of this Court in *Basavayya* v. *Guruvayya*[1]. He invited my attention to the following passage:

> "Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either *suo motu* or on the application of the parties. Order 20, rule 18, Civil Procedure Code, does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree".

That was a case where the plaintiff applied is an application for an enquiry into the profits of the properties realised by the defendants subsequent to the institution of the suit

1. (1951) 2 M L. J. 176 : I. L. R. (1952) Mad 173 : 64 L. W. 669 : A.I.R. 1951 Mad 938.

and for a final decree for his share of such profits. The defendants opposed the application on the ground that there was no prayer in the plaint for recovery of such profits and the preliminary decree passed in the suit did not direct an enquiry into the same. It is under those circumstances, the learned Judges held that a suit for partition by a member of a joint Hindu family is substantially a suit for an account of the joint family properties on the date of the suit as well as all the profits received by the manager since that date, so that the profits should also be divided and his proper share given to him and that a partition suit in which a perliminary decree has been passed is still a pending suit and the rights of parties have to be decided on the date of flinal decree. To the same effect is the ruling in *C. Vasantha* v. *S. C. Pandian*[1]. A Division Bench of this Court took the view that even if the plaintiff, by mistake or by inadvertent omission, fails to make a prayer for future mesne profits, the Courts are not powerless as to granting the equitable relief for future mesne profits having regard to the circumstances of each case and that the Court has got a discretion under Order 9, rule 12, Civil Procedure Code, when it is asked for by the plaintiff/decreeholder before the termination of such a lis. The plaintiff is not asking for mesne profits in this case. It is allotment of a property on which he has built the superstructure. It must be remembered that the plaint specifically prayed for removal of the superstructure built on item 14 by the revision petitioner herein and a decree has been passed for removing the said superstructure. No appeal has been preferred by the revision petitioner herein and the preliminary decree has become conclusive.

3. In *Venkata Reddy* v. *Bathi Reddy*[2] the Supreme Court observed :-

> "A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, by regarded as conclusive. No doubt, in suits which contemplate the making of two decrees, a preliminary decree and a final decree the decree which would be executable would be the final decree. But the finality of a decree or a division does not necessarily depend upon its being executable."

1. (1978) 1 M. L. J. 1 : 91 L. W. 139.
2. (1963) 2 M. L. J. (S. C) 126 : (1963) 2 An. W. R. (S. C) 126 : (1963) 2 S. C. J. 577 : A. I. R. 1963 S. C. 992.

In this connection, reference can be made to section 97 of the Code of Civil Procedure which states that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he is precluded from disputing its correctness in any appeal that may be preferred from the final decree. Admittedly, the 28th defendant, the revision petitioner, who remained *ex parte*, has not preferred any appeal against the preliminary decree directing removal of the superstructure built on item No. 14 and allotting item No. 14 to sharers. Therefore, a preliminary decree, unless appealed against, will be a final decision of the Court passing that decree. However, Mr. Subramanian, invited my attention to a ruling of a Division Bench of this Court in *A. C. C. Limited* v. *V. Ramakrishna*[1], and contended that the rule of estoppel would prevent the plaintiffs from claiming the property to be theirs as by their conduct they have acquiesced in the construction of the superstructure on item No. 14. The case referred to in the Division Bench decision is a case for possession of a property by a trespasser. But, here the plaintiffs only seek partition of their share of the properties. If a co-sharer constructs a superstructure on a property in which every sharer has a right, he does so at his own risk. As long as the preliminary decree has not been altered or modified or set aside, the revision petitioner cannot, in my view, ask for allotment of item 14 in the property over which he has built the superstructure which has been directed to be removed by the preliminary decree passed by the Court. In that view, the order of the lower Court is correct and has to be confirmed and is hereby confirmed. The revision fails and is dismissed. No costs.

R. S. —— *Revision dismissed.*

1. I. L. R. (1965) 1 Mad. 237 : 77 L. W. 659 A. I. R. 1965. Mad. 318.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

T. Damodaran and others ... *Petitioners**

v.

Kamalammal ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (2) (ii) (a)—*Subletting, what is meant by—Transfer of entire interest by tenant in the building will entitle the landlord to get an order of eviction.*

Subletting is transfer by a tenant of a right less than what he himself has and retaining the reversion, whereas a transfer of the rights of a tenant is parting with the entire interest the tenant has without retaining any interest. What is contained in section 10 (2) (*ii*) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act is that the landlord is entitled to an order of eviction in a case of transfer of the tenant's rights to another or subletting which is transfer of a limited right by the tenant. When subletting (transfer of a limited right) is pleaded and the transfer of the entire rights of the tenant is established the landlord is entitled to succeed. The landlord cannot fail on account of want of a plea regarding the transfer of the right by the tenant. [*Paras. 11 and 12.*]

Since subletting is a transfer of leasehold right in a limited way and assignment is a transfer of the entire interest of the tenant, the plea of subletting *viz.*, the transfer of a limited right will entitle the landlord to an order of eviction in case of a transfer of the entire interest pleaded and proved. [*Para. 13.*]

Cases referred to:—

Venkatarama Iyer v. *Reuters Ltd.*, (1961) 2 M. L. J. (N. R. C.) 57; *M. Rodgers* v. *M. Prakash Rao Naidu*, (1969) 1 M. L. J. 332; *Pandit Krishan Lal* v. *Ganpat Ram Jhosla*, (1963) 1 S. C. J, 435 : (1962) 2 S. C. R. 17 : A. I. R. 1961 S. C. 1554; *Russeli* v. *Beecham*, (1924) 1 K. B. 525; *Mohammed Yusuf Zulaika Umma* v. *Abdul Khader*, (1980) 1 M. L. J. 218 : 93 L. W. 77 : I. L. R, (1980) 2 Mad. 131 : A. I. R. 1980 Mad. 143; *V. S. K. Chetty Choultry* v. *Veeraswami*, (1972) 1 M. L. J. 184 : 85 L. W. 192 : A. I. R. 1972 Mad. 303.

*C. R. P. No. 2359 of 1981. *22nd October*, 1982.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Decree of the Court of (VI Judge) Small Causes, Madras, dated 24th April, 1981 and made in H. R. A. No. 1235 of 1980 (H. R. C. No. 3571 of 1979 on the file of the XIII Judge) Court of Small Causes, Madras, dated 27th June, 1980).

R. Haridoss and *R. Subramaniam*, for Petitioners.

R. Sadagopan, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is filed by the tenant one T. Damodaran, Proprietor, Kamaladhar and Phonex Traders, and 3 others against whom an order of eviction was passed by the appellate authority and the IV Judge, Court of Small Causes, Madras in H. R. A. No. 1235 of 1980.

2. The facts of the case are briefly as follows:—The landlady, the respondent herein, filed an application in H. R. C. No. 3571 of 1979 against T. Damodaran, Proprietor, Kamaladhar Press & Phonex Traders (the first civil revision petitioner) under sections 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act XXIII of 1960 as amended by Act XXIII of 1973, hereinafter referred to as the Act, in respect of the premises bearing door No. 245, Thambu Chetty Street, Madras-1. The case of the landlady is that the abovesaid premises was let out to the first civil revision petitioner for non-residential purpose on a monthly rental of Rs. 138 and the tenancy is according to the English calendar month. The tenant is always irregular in payment of rent and he is in default in payment of rent from 1st June, 1979 to 30th September, 1979

and as such he has committed wilful default in payment of rent. The landlady also contended that the tenant had sublet the premises to the civil revision petitioners 2 to 4 without her written consent and as such he is liable to be evicted on this ground also. In the counter statement the first civil revision petitioner contended that he is not the tenant under the landlady in his individual capacity but a firm under the name and style of Kamaladhar Press is the tenant. He further stated in his counter statement that he has transferred the rights, liabilities, responsibilities, assets, machineries, stock in trade, goodwill and other rights accrued therein to the civil revision petitioners 2 to 4 as early as on 29th October, 1979, which is well-known to the landlady. She was also present at the time of inauguration of the firm by the civil revision petitioners 2 to 4 on 29th October, 1979, and as such there is no subletting on the part of the first civil revision petitioner. He has also contended that the allegation regarding the wilful default is not true and that from 1st June, 1979 to 30th September, 1979 he had paid the rent to the landlady for which receipts had not been passed by the landlady. His further contention is that the landlady is keeping Rs. 560 as advance which is more than a month's rent in respect of the tenancy. The landlady is not in the habit of issuing receipts and in good faith the first civil revision petitioner used to send the rent by bearer. The rent was raised to Rs. 150 from July, 1979 onwards and he paid the increased rent. The rent for October, 1979 was sent by M. O. which was refused by the landlady. Hence it is contended that there is no wilful default on the part of the tenant in payment of rent. The tenant (the first civil revision petitioner) also contended that he and civil revision petitioners 2 to 4 met the landlady in October 1979 and informed her that they are prepared to pay the enhanced advance and also the enhanced rent. But the landlady demanded exorbitant pugree which the civil revision petitioners were not willing to pay. Hence the landlady has come forward with the rent control application.

3. The learned Rent Controller on a scrutiny of the documents and oral evidence and also relying upon the accounts maintained by the tenant which shows the payment of rent to the landlady and also relying on the fact that the rent for October, 1979 was sent by M. O. which was refused by the landlady and also accepting the version of the tenant that the landlady never used to issue receipts for the payment of rent came to the conclusion that there is no wilful default in payment of rent from July, 1979 to October, 1979. On the second ground, of sub-letting the learned Rent Cotroller came to the conclusion that only Kamaladhar Press and Phonex Traders is the tenant and the tenancy is only on behalf of the press and the receipts were issued to the first civil revision petitioner only in his capacity as proprietor and not as an individual and in this case there is only a transfer of leasehold right and the same is different from sub-letting and hence on facts there is no sub-letting at all and what was done is only a transfer of interest in a partnership firm and the press remains the same and the trade is also the same, and dismissed the petition for eviction. As against the said order of dismissal the landlady filed H. R. A. No. 1235 of 1980 on the file of the appellate authority the IV Judge, Court of Small Causes, Madras. The appellate authority concurred with the finding of the Rent Controller on the question of wilful default in payment of rent but on the question of sub-letting the appellate authority came to the conclusion that the transfer of rights in the Kamaladhar Press and Phonex Traders to the civil revision petitioners 2 to 4 and putting them in possession thereof will fall squarely within the mischief of section 10 (2) (*ii*) (*a*) of the Act and ordered eviction on this ground. As against the order of eviction passed by the appellate authority the above civil revision petition is filed.

4. In this civil revision petition the order of eviction of the tenants in occupation *viz*., the civil revision petitioners 2 to 4 under section 10 (2) (*ii*) (*a*) passed by the appellate authority is being questioned. Before examining the merits of the order of the Appellate Authority it will be useful to state certain facts based on the evidence that may have a bearing on the conclusion. The premises belongs to the respondent landlady and the same was originally leased out to the first civil revision petitioner T. Damodaran. The case of the tenant is that the lease is to the firm Kamaladhar Press and Phonex Traders of which T. Damodaran is the Proprietor and the lease is not to the individual. In support of this contention it is pointed out that the

receipts for the payment of rent *viz* Exhibit 1 series stand in the name of Kamaladhar Press and Phonex Traders. It is the case of the tenant that by means of document Exhibit B-4 the business under the name and style of Kamaladhar Press and Phonex Traders was transferred as a going concern to the civil revision petitioners 2 to 4 and even after such a transfer Kamaladhar Press and Phonex Traders existed and the transferee continued the business under the same name and style and as such there is no transfer of right in the lease or sub-letting. Such an assignment as a going concern according to the tenant will not amount to a transfer of right uuder the lease since the business is carried on under the same name and there is no sub-letting since the transferor did not retain any interest in respect of the firm. The first civil revision petitioner admits of having transferred the firm *viz.*, Kamaladhar Press and Phonex Traders to the civil revision petitioners 2 to 4. On behalf of the landlady it is contended that such a transfer will amount to a transfer of rights under the lease coming within the mischtef of section 10 (2) (*ii*) (*a*) of the Act. Reliance is placed upon the case reported in *Venkatarama Iyer* v. *Reuters Limited*[1], in which Subba Rao, J., as he then was, held that if a company doing business in a particular premises (taken on lease) transfers its business as a going concern to another company and also the net assets for consideration and thereafter the transferee company takes over the business and carries on business in the premises let out to the former company it cannot be said that there was no transfer of the right of the former company under the lease to the latter company and on such transfer the tenant is liable to be evicted. In *M. Rodgers* v. *M. Prakash Rao Naidu*[2], a tenant who was running a press in the buildings (a business premises) with his machinery, stopped the business and his previous manager was running a press as a lessee of the machinery. The petitioner/tenant had no share in that business. In an application for eviction on the ground of sub-letting Alagiriswami, J., as he then was, held that the tenant is liable to be evicted on the ground of subletting. Alagiriswami, J., expressed the view that the machinery cannot be run unless it is placed in the premises where it is situate. So, the lessee of the machinery also gets the advantage of the use of the business premises also. Therefore the lease amount which the lessor receives should contain in it an element of rent for the building which is used to house the machinery. It is unbelievable that the lessor would take rent for the use of the machinery alone and not take any rent for the use of the business premises and agree to pay the rent himself. It is not an answer under these circumstances against the charge of sub-letting to say that the lesser does not take anything separately from the lessee by way of rent for the building itself or that he himself is paying the rent to the landlord and sub-lessee is not paying the rent to the landlord. In *Pandit Kishan Lal* v. *Ganpat Ram Jhosla and another*[1], the Supreme Court observed as follows :

> "Where a company who is a tenant of certain premises, lets into possession another person without the consent of the landlord and without determining the tenancy by a notice as required by law, there is an assignment of the tenancy and the assignee cannot be regarded as a trespasser. The assignee of the tenancy rights of the company is as much liable to be sued in the Court of the Controller as the company for an order of ejectment".

5. Relying on the above decisions it is contended that what was done by the tenant in this case is transfer of the entire business to the civil revision petitioners 2 to 4 which will come within the mischief of section 10(2) (*ti*) (*a*) of the Act. Section 10 (2) (*ii*) (*a*) of the Act lays down that the landlord is entitled to an order of eviction in case of transfer of rights under the lease as well as sub-letting. On behalf of the tenant it is contended that the rent control application was filed only on the ground of subletting and not of the ground transfer of rights in the lease and both are different causes of action and if an application for eviction is filed on the ground of sub-letting the tenant cannot be evicted on the ground of transfer of his right under the lease.

1. (1961) 2 M. L. J. 57 (S. N.).
2. (1969) 1 M. L. J. 332.

1. (1963) 1 S. C. J. 435 : (1962) 2 S. C. R. 17 : A. I. R. 1961 S. C. 1554.

6. In support of argument of the tenant that the transaction in the present case will amount to transfer of right in the lease and not subletting, reliance is placed upon *Russell and another* v. *Beecham and another*[1]. In that case there was a lease for thirty years from March, 1899, which contained a covenant by the lessee that he would not assign or part with the lease or the premises or any part thereof without the licence and consent in writing of the lessor or his trustees. The lease also contained a proviso for re-entry by the trustees for breach of his covenants by the lessee. Basing upon under-lease the landlord filed an application for recovery of possession. In the course of the judgment holding that an underlease will not amount to transfer, the following observation is found :-

> "Assign, transfer, and set over, are mere words of assignment; otherwise do, or put away signifies any other mode of getting rid of the premises entirely, and cannot be confined to the making of an underlease.".

The principle laid down in this case applies to a case where the chief tenant had retained an interest in the leasehold property. But in the present case the tenant, the first civil revision petitioner, did not retain any interest and hence the above principle cannot be applied to the facts of the present case. In Hill and Redman's Law of landlord and and Tenant (14th edition) at page 644, the following observation is found :

> "*Covenant against assignment only does not prohibit underletting.*—Covenant not to assign, transfer, or set over, or otherwise do or put away with' the lease or the demised premises ..... A sub-lease for one year from a future date is not a breach of covenant not to sublet for more than one year."

7. In Adkin's Landlord and Tenant (17th edition) at page 65 the following observation is found :—

> "An assignment is a parting with the entire interest which a person possesses in a property ; whereas a sub-lease is a parting with only apportion of the interest and retaining a portion. A covenant not to assign is not broken by sub-letting."

8. The observations referred to in the abovesaid two text-books are to the effect that when the tenant retains an interest in the lease-hold property and transfers only a limited right, it will not amount to an assignment of the leasehold right. In the present case the tenant had assigned his entire interest and hence the above principle has no application to the present case. In Woodfall's Law of Landlord and Tenant (24th edition) at page 585 the following observation is found:—

> "A covenant not to assign or part with the lease or the premises hereby demised, or any part thereof,' is not broken by a subletting of part of the permises".

9. The present case is not one of subletting of part of the premises and hence the above principle has no application to the present case. In the present case the tenant did not retain anything after the transfer under Exhibit R. 4 and under the circumstances the transaction only be construed to be a transfer of right under the lease. In the rent control application there is no plea regarding the transfer of rights under the lease bnt there is only a plea of subletting. It is contended on behalf of the tenant that having pleaded subletting as the ground of eviction the landlord cannot turn round and ask for eviction on the ground of transfer of rights under the lease. This contention will have to be considered in the proper perspective. Subletting in the altimate analysis is also a transfer of right under the lease in which the chief tenant retains some interest. Dealing with the difference between subletting and assignment the following passage occurs in Adkin's Landlord and Tenant (17th edition) at page 65:

> "An assignment is a parting with the entire interest which a person possesses in a property; whereas a sub-lease is a parting with only a portion of the interest and retaining a portion. A covenant not to assign is not broken by subletting".

10. In Hill and Redman's Law of Landlord and Tenant (14th edition) at page 177

1. (1924) 1 K. B. 525.

paragraph 108 deals with the effect of underleases and the same is reproduced below:—

"108. *Effect of underleases.*—The lessee of property can, in the absence of agreement restricting his right, underlet it for any period less than the residue of his own term but if he purports to underlet by deed for a term equal to, or greater than, the residue of his own term, this operates as an assignment of his term, and not as an underlease, Consequently, in such a case, no reversion remains in the underlessor, and he cannot distrain for rent reserved by the underlease, though he can sue for it as rent, and not merely as an independent sum".

In the commentary to the above paragraph 108 it is stated as follows:—

"When an underlease is made for the whole term less one day, and the underlessor is trustee for the underlessee of the nominal reversion, the underlessee can on the underlessor's death intestate obtain administration limited to the outstanding day for the purpose of getting it in."

11. From the above passages it is seen that subletting is transfer by a tenant of a right less than what he himself has and retaining the reversion ; whereas a transfer of the rights of the tenant is parting with the entire interest the tenant has without retaining any right. What is contained in section 10 (2) (*ii*) (*a*) is that the landlord is entitled to an order of eviction in case of transfer of the tenant's right to another or subletting which is transfer of a limited right by the tenant. When subletting (transfer of a limited right) is pleaded and the transfer of the entire rights of the tenant is established, the landlord is entitled to succeed. It is laid down in the case reported in *Mohammed Yusuf Zulaika Umma* v. *Abdul Khader*[1], where a Division Bench of this Court observed as follows:—

"Section 10 (2) (*ii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by the Act XXIII of 1973 contemplates two situations, one dealing with the tenant transferring his rights under the lease or subletting the entire building, and the other with dealings by the tenant using the building for a purpose other than that for which it was leased. On a harmonious construction of the above clauses, it will be seen that the expression "that the tenant has after the 23rd October, 1945, without the written consent of the landlord, transferred his rights under the lease or sublet the entire building or any portion thereof" from the very nature of the case, does not contemplate the continuance of the subletting. All that is required is that subsequent to 23rd October, 1945, the tenant should have sublet the premises without the written consent of the landlord. Once this requirement is satisfied the tenant forfeits his protection and becomes liable to be evicted, and the statute does not impose a further condition that the subletting must be continuing throughout the entire course of the eviction petition. If such construction were to be put on the statutory provision, the tenant will be able to play a hide and seek game and the moment he comes to know of the landlord's intention to file a petition, he can temporarily cause the tenant to vacate the premises in question and occupy it himself, and as soon as the petition for eviction is dimissed, he can re-induct the sub-tenant into the premises. This could not have been the intention of the Legislature, and the statutory provision like the one under consideration cannot also be construed in such a manner."

12. The principle laid down in the above case, can be extended to the present case and viewed in the proper perspective the claim of the landlady cannot fail on account of want of a plea regarding the transfer of the right by the tenant. In the case reported in *V. S. K. Chetti Choultry* v. *Veeraswami*[1], a single Judge of this Court observed as follows:

"It is clear from section 10 (2) (*ii*) (*a*) of the Madras Buildings (Lease and Rent

1. (1980) 1 M. L. J. 218 : I. L. R. (1980) 2 Mad. 131 : 93 L. W. 77 : A. I. R. 1980 Mad. 143.

1. (1972) 1 M. L. J. 184 : 85 L. W. 192 : A. I R. 1972 Mad. 303.

Control) Act that a tenant cannot without the written consent of the landlord transfer his rights under the lease or sub-let the entire building or part thereof, if the lease does not confer on him any right to do so. Hence if a tenant sub-lets even a portion of the lease-hold premises it will entail liability for eviction."

13. Since sub-letting is a transfer of leasehold right in a limited way and assignment is a transfer of the entire interest of the tenant the plea of sub-letting *viz.*, the transfer of a limited right, will entitle the landlord to an order of eviction in the case of a transfer of the entire interest if pleaded and proved.

14. On a consideration of the entire circumstances the only conclusion that can be arrived at in this case is that the landlady is entitled to evict the tenant under section 10 (2) (*ii*) (*a*) of the Act. There are no merits in this civil revision petition and hence the same is dismissed. There will be no order as to costs. However, the tenant's given one year time to vacate the premises.

R. S. — *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

D. Rukmani Ammal and others ... *Petitioners**

v.

V. K. Izudden. .. *Respondent**

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 2 (2), 14 (1)* (b) — *"Building" occurring in section 14 (1)* (b) *may mean more than one building let under a single lease*—Bona fide *requirement for demolition and reconstruction—Means of the landlord relevant factor—Not necessary to jingle the coins before the Controller.*

(B) *Premises demised consisting of two door numbers—Single petition for eviction, if maintainable—Test.*

Neither in section 2 (2) nor in section 14 (1) (*b*) of the Tamil Nadu Act (XVIII of 1960), there is anything expressly or impliedly repugnant to construing the term "building" occurring in section 14 (1) (*b*) to signify "building" in plural, in appropriate cases, where such building, in plural, forms or could form a separate unit as a whole and had been leased out as such. The criterion to be applied under section 14 (1) (*b*) in appropriate cases is that if a particular unit, be it part of a particular building or more than one building is let or couldbe let separately under a single lease, such a unit will come within the ambit of section 14 (1) (*b*) and the structural proximity and the other physical features are also relevant factors to be taken note of and considered in such a case. [*Para.* 6.]

It is well-established that the means of the landlord to carry out the work of demolition and reconstruction is a relevant factor to be taken note of and considered while testing his *bona fides*. But this does not necessarily mean that the landlord should jingle the coins before the Controller to establish this factor. [*Para.* 14.]

As to the maintainability of a single eviction petition in cases of premises carrying two door numbers, the real question is whether any prejudice is caused to the tenant by the procedure of filing a single eviction petition. [*Para.* 8.]

Where though there are two different door numbers they are the subject-matter of a single lease to a single tenant and structurally they are situated proximately in circumstances justifying their being treated as a single unit let out as such to the tenant, in common enjoyment as a whole, no prejudice can be held to be caused to the tenant by the process of a single eviction petition. [*Para.* 9.]

Cases referred to:—

T. N. Unnamali Achi v. *Saminatha Pathar*, (1980) 93 L. W. 404 ; *Kandaswamy* v. *Hajee K. S. Mohd. Mohideen Rowther*, (1982) 1 M. L. J. 179 ; *Gopalakrishna Chetty* v. *Ganeshan*, (1976) 1 M. L. J (S. C.) 27 : (1976) 1 S. C. J. 358 : (1976) 1 S. C. R. 273 (1975) 2 S. C. C, 408 : A. I. R. 1975 S. C 1750 ; *Umsalma Biby* v. *Lakkia Gowder* (1967) 1 M. L. J. 277 ; *Govindaswami Naicke* v. *Karwar*, (1969) 82 L. W. 137; *Neta Ram* v

*C. R. P. No. 3247 of 1981. 26*th November*, 1982.

Jiwan Lal, (1962) 2 S. C. J. 270 : A. I. R. 1963 S. C. 499 ; *Metalware and Company* v. *Bansilal*, (1979) 2 S. C. J. 377 : (1980) 1 M. L. J. (S. C.) 1 : (1979) 3 S. C. C. 398 : A. I. R. 1979 S. C. 1559 ; *Sri Rajalakshmi Dying Works* v. *Ramaswamy*, (1980) 2 R. C. J. 165 : A. I. R. 1980 S. C. 1253 ; *Poppu Ammal* v. *Lab Chemicals*, (1978) 91 L. W. 219 : (1978) 1 M. L. J. 523 : A. I. R. 1978 Mad. 272 ; *A. M. Batcha v. T. M. P. C. Ramachandran*, (1979) T. L. N. J. 73.

Petition under section 25 of the Tamil Nadu Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Court of Small Causes (IV Judge), Madras, dated 7th August, 1981, and made in H. R. A. No. 1782 of 1980 (H. R. C. No. 355 of 1979), dated 25th July, 1980, Court of Small Causes (X Judge), Madras.

A. Subramania Iyer, for Petitioners.

T. Viswanatha Rao and *K. P. Unni Krishnan*, for Respondent.

The Court made the following

ORDER.—The landlords within the meaning of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), hereinafter referred to as 'the Act' are the petitioners in this revision. The respondent herein is the tenant within the meaning of the Act. The landlords sought the eviction of the tenant under section 14 (1) (*b*) of the Act on the ground that they *bona fide* required the premises demised for demolition and reconstruction The tenant contested the petition of the landlords and yet, the Controller countenanced the case of the landlords and ordered eviction of the tenant. The tenant appealed and the appellate authority discountenanced the case of the landlords on two grounds, namely, (1) the premises desmised consisted of two door numbers and a single petition for eviction would not lie and (2) the landlords have not proved their means to undertake the work of demolition and reconstruction. The other points have been found in favour of the landlords by the appellate authority; the appellate authority found that the landlords are armed with a sanctioned plan from the Corporation of Madras for the work of demolition and reconstruction and the existing condition of the premises bear out the *bona fide* requirement of the landlords for demolition and reconstruction.

2. Mr. V. Avudainayagam, learned counsel appearing for the landlords, would submit that the appellate authority, on the two points found against the landlords, has not applied the correct principles governing them and on this ground, the learned counsel would solicit interference in revision by this Court. There is no doubt that as on the relevant date, the premises demised consisted of two door numbers, one is Door No. 77 (old No. 212), Triplicane High Road, Madras-600005, and the other is Door No. 7 (old No. 1/48), First Floor, Khanabagh Street, First Lane, Triplicane, Madras-600005. Originally, Door No. 77, Triplicane High Road, alone was the subject-matter of demise and subsequently, the tenant has been inducted into possession in the upstairs of Door No. 7, Khanabagh Street, First Lane. There is a deed of lease dated 7th September, 1960. This deed covered both the door numbers. By this deed, the lease given was a single lease. Both the door numbers were treated as a single unit with regard to the terms governing the lease. Only one rent per month was stipulated. The landlords relied on Exhibit P-11, the report of a retired Assistant Engineer in the Corporation of Madras. It shows that Door No. 7, Khanabagh Street, First Lane, is directly abutting Door No. 77, Triplicane High Road, in the rear of the latter, and they are abutting back to back. Exhibit R-10 is the report of a Civil Engineer relied on by the tenant and this also-shows that the access to the first floor in Door No. 7, Khanabagh Street, First Lane, which is also in the occupation of the tenant under the single lease, is only from Door No. 77, Triplicane High Road by a pucca staircase. This report Exhibit R-10 further discloses that there is no entrance from Door No. 77, Triplicane High Road, which is in the occupation of the tenant, to the ground floor of Door No. 7, Khanabagh Street, First Lane, and equally so, there is no entrance from the first floor of Door No. 7, Khanabagh Street, First Lane, to the ground floor in the same door number. These details amply demonstrate that Door No. 77, Triplicane High Road, and the first floor in Door No. 7, Khanabagh Street, First Lane, are practically forming a single unit though they bear fferent door numbers.

3. The appellate authority relied on a judgment of this Court in *T. N. Unnamalai Achi* v. *Saminatha Pathar*[1], to hold that a single petition for eviction is not maintainable in the instant case. In my view, the facts of the present case do not justify the application of the ratio pronounced by me in that case. In *T. N. Unnamalai Achi* v. *Saminatha Pathar*[1], the building bore three door numbers; those three door numbers were let out at different points of-time; the three door numbers were not found to be covered by a single tenancy arrangement, the three door numbers were not found to be in one and the same premises and the three door numbers were not leased out to serve same purposes, residential or non-residential, and on the other hand, two served purposes residential; the third one served purposes non-residential and further, it was found that the clubbing of the three door numbers together for the purpose of obtaining reliefs under the provisions of section 10 (3) (*a*) (*i*) of the Act, will cause prejudice to the tenant.

4. Sengottuvelan, J., in *Kandaswamy* v. *Hajee K. S Mohd. Mohideen Rowther*[2], dealt with a case where the concerned premises were two separate portions of the building with another portion in between; a consolidated rent for both the premises was fixed and there was no separate tenancy agreement in respect of each of the premises and both the landlord and the tenant had proceeded all along on the basis of a single tenancy, and the learned Judge, after adverting to the case law on the subject, held that a single petition for eviction in that case under section 10 (2) (*ii*) (*b*) and 10 (2) (*iii*) of the Act in respect of the entire premises can be maintained. Reference may also be made to the decision of the Supreme Court in *Gopalakrishna Chetty* v. *Ganeshan*[3], where the Supreme Court repelled the contention that a single petition with regard to two different tenancies although in the same premises, one for residential purpose and the other for non-residential purpose is not maintainable as without substance since the tenancy was one.

5. Mr. T. Viswanatha Rao, learned counsel for the tenant, would urge that if two tenancies are in the same premises, there may be a warrant for maintaining a single petition for eviction under section 14 (1) (*b*) of the Act and he would state that in the instant case, there are two different door numbers and hence, on this ground, the learned counsel for the tenant wants to sustain the order passed by the appellate authority.

6. Section 2 (2) of the Act defines "building" as any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes.........Neither in section 2 (2) nor in section 14 (1) (b) of the Act there is anything expressly or impliedly repugnant to construing the expression "building" occurring in section 14 (1) (*b*) to signify "building" in plural, in appropriate cases, where such building, in plural, forms or could form a separate unit as a whole and had been leased out as such. Of course, the definition of "building" takes in part of a building. The criterion to be applied under section 14 (1) (*b*) in appropriate cases is that if a particular unit, be it parts of a particular building or more than one building is let or could be let separately under a single lease, such a unit will come within the ambit of section 14 (1) (*b*), and the structural proximity and the other physical features are also relevant factors to be taken note of and considered in such a case.

7. Ananthanarayanan, CJ., in *Umsalma Biby* v. *Lakkia Gowder*[1], dealt with a case under section 14 (1) (*b*) of the Act where there were distinct and several door numbers or tenants in a single structure and obviously covered by different and separate tenancies and in occupation of different tenants, and in that context, the learned Chief Justice, taking note of the definition of "building" under the Act, observed that the landlord must make a separate application in each such instance though all these "buildings" may be within one structure. Yet, the learned Chief Justice, obviously keeping in mind the cardinal and salutary principle that if no prejudice has

1. (1980) 93 L. W. 404.
2. (1982) 1 M. L. J. 179.
3. (1976) 1 M. L. J. (S. C.) 27 : (1976) 1 S. C. J. 358 : (1975) 2 S. C. C. 408 : 1975 R. C. J. 500 : (1976) 1 S. C. R. 273 : A. I. R. 1975 S. C. 1750.

1. (1967) 1 M. L. J. 277.

been or is being caused to the tenant even in such a contingency, Courts shall not throw out such proceedings, declined to interfere in revision.

8. In all such cases, the real question is whether there has been any prejudice caused to the tenant or tenants by the said procedure of filing a single petition. Ananthanarayanan, CJ., applied the same principle to a case of a single petition under section 6 of the Act against different tenants in *Govindaswami Naicker* v. *Karwar*[1]. I have also kept in mind this principle while deciding the case in *T. N. Unnamalai Achi* v. *Saminatha Pathar*[2].

9. In the instant case, though there are two different door numbers they have been the subject-matter of a single lease and that too, to a single tenant; and structurally the two door numbers are situated in such a proximity and other physical features establish such a nexus that there is a warrant to treat them as a single unit let out as such to the tenant. The tenant is in common enjoyment of the unit as a whole though bearing two different door numbers. By no stretch of imagination it could be stated that the tenant was put to prejudice by the process of a single petition for eviction under section 14 (1) (*b*) of the Act adopted by the landlords.

10. Mr. T. Viswanatha Rao would point out yet another feature to state that a single petition could not be maintained and that is, on the date of the petition before the Controller, the two door numbers had come to be owned by two different persons amongst the landlords by virtue of a partition arrangement *inter se* the landlords. It is not pleaded that by virtue of this division amongst the sharers, namely, the landlords, there is a split up in the tenancy. The division is an arrangement *inter se* the landlords and it has not brought about a disruption in the tenancy and the unit of the tenancy as a single one taking in both the door numbers continued and continues. Admittedly, the tenant has not attorned to different landlords after any such division amongst them. Hence this objection cannot be sustained to overthrow the petition for eviction put forth by the landlords.

1. (1969) 83 L. W. 137.
2. (1980) 93 L. W. 404.

11. The second ground on which the appellate authority discountenanced the landlord's petition is that they have not proved their means to undertake the work of demolition and reconstruction. Section 14 (1) (*b*) of the Act by itself does not lay down in specific terms that the landlord must demonstrate before the Controller that he has got the means to carry out the work of demolition and reconstruction. This element has been brought in under the caption "*bona fide*" which is an essential feature to be considered for the purpose of sustaining the application of the landlord under section 14 (1) (*b*) of the Act.

12. In *Neta Ram* v. *Jiwan Lal*[1], while stating as to how the Controller has to be satisfied about the genuineness of the claim of the landlord, the Supreme Court observed that to reach this conclusion, the Controller must be satisfied about the reality of the claim made by the landlord and this can only be established by looking at all the surrounding circumstances, including the means of the landlord.

13. In *Metalware & Company* v. *Bensilal*[2], the Supreme Court while dealing with the question as to how far the existing condition of the building far from being totally irrelevant, is a vital factor, referred to the observations in *Neta Ram's case*[1], and indicated that even if the landlord had established that he had means to reconstruct the houses, the existing state of the building is a relevant factor.

14. We can take it as settled that the means of the landlord to carry out the work of demolition and reconstruction is a relevant factor to be taken note of and considered while testing his *bona fides*. But this does not necessarily mean that the landlord should jingle the coins before the Controller to establish this factor. As observed by Ramaprasada Rao, CJ., in *A. M. Batcha and another* v. *T. M. P. C. Ramachandran*[3], "the question has to be looked into from a more liberal angle. If the petitioners

1. (1962) 2 S. C. J. 270 : A. I. R. 1963 S. C. 499.
2. (1979) 2 S. C. J. 377 : (1980) 1 M. L. J. (S. C.) 1 : (1979) 3 S. C. C. 398 : A. I. R. 1979 S. C. 1559.
3. C. R. P. No. 1733 of 1975, dated 19th January, 1979, Concisely reported in 1979 T. L. N. J. 73.

have proved that they are capable of raising funds for the purpose of such demolition and reconstruction, as was done before the Rent Controller and as was accepted by him, this would suffice for the purpose". The appellate authority in the instant case has not kept in mind the above principle and on the other hand, it has chosen to take a technical view of the matter. P. W. 2 is the second petitioner. He is a draughtsman in the Public Works Department and he has deposed that he can raise funds by obtaining loan from the Government. The appellate authority eschews his evidence by stating that he has not already applied for any such Government loan. This reasoning is arbitrary. It is not suggested that P. W. 2 will have difficulties in getting the Government loan after he is armed with an order of eviction. It would be a futile process to insist that he should have already applied for the loan or obtained the loan when the possibility of obtaining an order of eviction is subject to the vicissitudes of a legal process. P. W. 3 is the fourth petitioner. Her evidence has not at all been adverted to by the appellate authority. Her evidence is that she is possessed of jewels of considerable value.

15. P. W. 4, is the husband of the fourth petitioner. He is employed in the Life Insurance Corporation of India. He has deposed that he can get the loan for constructing a building in the property. The appellate authority points out that P. W. 4 cannot obtain a loan for putting up a construction in the property belonging to his wife. No such impediment was factually demonstrated before the appellate authority and I do not know how it conceived such an idea. It is only to demonstrate that the Life Insurance Corporation of India is amenable to grant a loan to P. W. 4 for constructing a residential house on the property belonging to his wife, that the landlords have taken out C. M. P. No. 10849 of 1981 in this revision, for receiving the certificate given by the Life Insurance Corporation of India, dated 21st September, 1981, stating that P. W. 4 is eligible for such a loan. It is not necessary to entertain this petition at this revisional stage because I am not able to appreciate and accept the theory put forth by the appellate authority that no such loan is feasible for P. W. 4, in the absence of any such factor brought to its notice, Mr. V. Avudainayagam, learned counsel for the landlords, brings to my notice the fact that in paragraph 4 of the petition for eviction the landlords have specifically averred that they have got ample means to meet the cost of the proposed work and significantly, in the counter filed by the tenant, this has not been specifically controverted at all. This factor also has been omitted to be taken note of by the appellate authority and if taken note of, the appellate authority would not have applied the onerous test to this question and cast an undue burden of proof on the landlords. In my view, the consideration of this question by the appellate authority is tainted with an untenable and stringent approach to the same and obviously this has vitiated its conclusion over it.

16. As a last attempt, Mr. T. Viswanatha Rao, learned counsel for the tenant, would submit that this Court sitting in revision under section 25 of the Act shall not reassess the evidence and the factual materials, and for this purpose he would rely on *Sri Raja Lakshmi Dying Works* v. *Ramaswamy*[1]. The observations therein are to the effect that a concurrent finding, based on evidence, that the landlord did not *bona fide* require the premises for his own use and occupation is not a finding which can be touched by the High Court exercising jurisdiction under section 25 of the Act. First of all, it is not a concurrent finding of facts by the two forums below. Secondly, it is not a case of reassessing the evidence in revisional jurisdiction. Here we find that there is a total transgression of the governing principles by the appellate authority when it considered the questions. When there is a misconstruction of the principles to be applied or when decisions have been rendered in ignorance of the said principles, certainly the matter would come within the ambit of the powers of this Court to correct and annul such improper irregular and illegal orders. I have taken such a view in *Pappu Ammal by Agent Pal Nadar* v. *M/s. Lab Chemicals*[2]. For all the above reasons, I am

1. (1980) 2 R. C. J. 165: A. I. R. 1980 S. C. 1253.
2. (1978) 91 L. W. 219 : (1978) 1 M. L. J. 523 . I. L. R. (1978) 2 Mad. 321 : A. I. R. 1978 Mad. 272;

obliged to interfere in revision and accordingly this revision is allowed, the order of the appellate authority is set aside, and the order passed by the Controller is restored. There will be no order as to costs. At the specific plea and request of the learned counsel for the tenant, the tenant will have three months from to-day to vacate.

S. J. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT.—*K. B. N. Singh, CJ. and S. Padmanabhan, J.*

P. Syed Mohammed ... *Appellant**

v.

V. P. L. Meenakshisundaram Chettiar ... *Respondent.*

Civil Procedure Code (V of 1908), Order 38, rule 1—Scope—Attachment before judgment when made in suit—Same principle cannot be applied at the appellate stage.

In a suit it is open to the plaintiff under Order 38, Civil Procedure Code, to satisfy the Court that a proper case was made out for attachment before judgment so that the plaintiff after his success in the suit may not be without remedy. The same principle cannot be ordinarily applied at the appellate stage when the trial Court has gone into the issue and found that a part of the plaintiff's claim has not been established. In such a situation, attachment should not be ordered as a matter of course. On the finding of the trial Court that the respondent was having 42½ sovereigns of gold chain as collateral security which in the ordinary course would be sufficient security even if any security was needed, no order of attachment could be made. On the facts of the present case, there is no justification in the appeal to attach the property of the defendant-appellant in respect of the disallowed portion of the claim made in the suit. [*Para.* 4.]

*L. P. A. No. 34 of 1982. 18*th October*, 1982.

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice Ratnam, dated 28th April, 1982 and made in the exercise of the Appellate Jurisdiction of the High Court in C. M. P.No. 3561 of 1982 in Appeal No. 794 of 1981.

C. M. P. No. 3561 of 1982:

Petition presented to this Court to modify the order of attachment, dated 7th January, 1982 and made in C. M. P. No. 13484 of 1981 in Appeal No. 794 of 1981 by raising the attachment on the properties on furnishing security.

C. M. P. No. 13484 of 1981 :

Petition presented to this Court to order the subsisting attachment of the properties mentioned in the schedule thereunder and made in I. A. No. 369 of 1979 in O. S. No. 87 of 1979, Sub-Court, Devakottai to continue, so as to prevent any alienation of the same pending Appeal No. 794 of 1981, preferred to this Court against the decree of the Court of the subordinate Judge, Devakottai, dated 19th August, 1981 and passed in O. S. No. 87 of 1979.

R. Gandhi, for Appellant.

A. R. Lakshmanan, for Respondent.

The Judgment of the Court was delivered by

K. B. N. Singh, CJ.—This appeal is against the order dated 28th April, 1982 made in C. M. P. No. 3561 of 1982 in A. S. No. 794 of 1981 on the file of this Court. By the said order, a learned single Judge of this Court (Ratnam, J.,) refused to modify his earlier order of attachment, dated 7th January, 1982 in C. M. P. No. 13484 of 1981 in the said appeal. The respondent herein filed the suit in O. S. No. 87 of 1979 on the file of the Court of the Subordinate Judge of Devakkottai against the appellant herein based on a promissory note, dated 27th November, 1976, for a sum of Rs. 13,000. The total claim made in the suit was Rs 36,128.65. The defendant who is the appellant herein contested the suit urged that out of the sum of Rs. 13,000 he actually received only Rs. 11,700 and by way of collateral security, he also deposited with. the plaintiff 42½ sovereigns of gold chain

The trial Court at the instance of the plaintiff ordered attachment of the defendant's properties. The trial Court came to the conclusion that the plaintiff actually advanced only Rs. 11,700 to the defendant and passed a decree only for a sum of Rs. 16,122. The trial Court also gave a finding that the defendant-appellant herein—had deposited with the plaintiff-respondent herein—42½ sovereigns of gold chain as collateral security which has not been returned. It is now submitted at the Bar that before the trial Court, the appellant herein deposited the entire decreetal amount. Being aggrieved that the entire suit claim was not decreed, the respondent herein filed an appeal before this Court. In the appeal he has also challenged the findings of the trial Court that 42½ sovreigns of gold chain is with him.

2 In the appeal, A. S. No. 794 of 1981, the plaintiff-appellant (respondant herein) filed a petition for attachment of the defendant's properties during the pendency of the appeal. The petition was contested by the appellant herein. The learned single Judge by his order dated 7th January, 1982, made the interim order of attachment absolute. The appellant herein filed C. M. P. No. 3561 of 1982 for modifying the earlier order and this petition was also dismissed on 28th April, 1982 and it is as against this order, the present appeal has been filed by the defendant in the suit. It may be mentioned here that in the affidavit filed in support of the petition in C. M. P. No. 3561 of 1982, the appellant herein had even offered security for vacating the order of attachment dated 7th January, 1982.

3. Mr. R. Gandhi, learned counsel for the appellant submitted ther respondent having lost in the suit with regard to the balance of the claim, could not maintain his petition for attachment of the appellant's property at the appellate stage. He further submitted that on the finding of the trial Court that 42½ sovereigns of gold chain had been deposited with the respondent herein as collateral security, no order of attachment could be passed even if it was open to the Court to pass such an order. Thirdly, he submitted that the decree was satisfied by the defendant by depositing a sum of Rs. 16,122 into the trial Court and there was nothing left for which the respondent could demand any security from the appellant on the basis of the decree. Mr. A. R. Lakshmanan, appearing on behalf of the respondent submitted that as per the allegations in paragraphs 11 and 12 of the affidavit filed by him, the appellant herein was likely to dispose of the property and the respondent would be without any remedy in case his appeal is allowed. He therefore submitted that the order of attachment should be sustained.

4. Having heard the learned counsel for the parties, we are not satisfied that there is any justification in an appeal for attaching the property of the defendant-appellant herein in respect of the disallowed portion of the claim made in the suit. The position in a suit is rather different where the issues have to be tried by the Court. In a suit it is open to the plaintiff under Order 38, Civil Procedure Code, to satisfy the Court that a proper case was made out for attachment before judgment so that the plaintiff after his success in the suit may not be without remedy. The same principle cannot be ordinarily applied at the appellate stage when the trial Court has gone into the issues and found that a part of the plaintiff's claim has not been established. In such a situation, attachment should not be ordered as a matter of course. On the finding of thet rial Court, that the respondent is having 42½ sovereigns of gold chain as collateral security which in the ordinary course would be sufficient security even if any security was needed, no order of attachment could be made. We are therefore satisfied that on the facts and circumstances of the case, no order of attachment could have been made attaching the property of the appellant herein during the pendency of the appeal. The appeal is accordingly allowed and the order of attachment is vacated. There will be no order as to costs in this appeal.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. A. Sathar Sayeed, J.*

Kuppa Boyan alias Kuppusamy Boyan and another ... *Petitioners**

v.

Sengottaiyan ... *Respondent.*

(A) *Execution—Petition to attach and sell property of judgment-debtor—Notice of execution petition given to judgment debtor—Petition filed by judgment-debtor to declare him an insolvent—Petition for appointment of receiver also filed—Sale of property in execution whether can be postponed in the circumstances.*

(B) *Provincial Insolvency Act (V of 1920), section 52—Applicability.*

A suit was filed resulting in a money decree. An execution petition was filed before the executing Court to attach and sell the property belonging to the judgment-debtors. The judgment-debtors having received notice of the execution petition filed an application wherein they stated that they had filed an Insolvency Petition to adjudge them as insolvents as they were unable to pay the debts of the pressing creditors, that they had also filed an application for the appointment of an interim receiver of their properties mentioned in the insolvency petition, that orders had been passed in the receiver petition and that the said order had been communicated to the Official Receiver. Under those circumstances they sought postponement of the sale of the properties.

Held, following the decision reported in *Ponnudurai* v. *Kumaraswami*, (1971) 2 M. L. J. 252 that merely because the judgment-debtor has filed an insolvency petition before the Insolvency Court, it cannot be said that the execution proceedings should be stayed. In this case, it was not stated that the properties of the petitioners were taken by the Official Receiver in pursuance of the order of the Insolvency Court, nor was the order of the Insolvency Court brought to the notice of the executing Court. [*Para.* 6.]

Cases referred to:—

Venkata Sivayya v. *Suryanarayana*, (1939) 1 M. L. J. 705 : [48 L. W. 279 : A. I. R. 1938 Mad. 406 ; *Ponnudurai* v. *Kumaraswami Mudaliar*, (1971) 2 M. L. J. 252.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Rasipuram, dated 11th March, 1982, and made in R. E. A. No. 156 of 1982 in R. E. P No. 301 of 1980 in O. S. No. 635 of 1972, District Munsifs Court, Namakkal.

S. Palaniswamy, for Petitioners.

T. V. Balakrishnan, for Respondent.

The Court made the following:

ORDER.—The order of the Learned District Munsif, Rasipuram in R. E. A. No. 156 of 1982 in R. E. P. No. 301 of 1981 in O. S. No. 635 of 1972 is questioned in the above revision.

2. It appears from the facts of the case and also as argued by the respective counsel appearing for the parties that the respondent herein filed O. S. No. 635 of 1972 before the District Munsif's Court, Namakkal against the petitioners herein. The second petitioner is the wife of the first petitioner. The plaintiff, who is the respondent herein obtained a decree against the petitioners, who were the defendants in the suit, for a sum of Rs. 5,000 on 12th June, 1972. In pursuance of the decree obtained by the plaintiff, E. P. No. 301 of 1981 was filed before the executing Court to attach and to sell the property belonging to the judgment-debtors situate in S. No. 20/3, Moolakurichi village. measuring 3.93 acres with a well and pumpset. The judgment-debtors having received the notice of the execution petition filed R. E. A. No. 156 of 1982 wherein they contended that they have filed I. P. No. 9 of 1982 before the Sub-Court, Namakkal to adjudge them as

*C. R. P. No. 1348 of 1982. 23rd September, 1982.

insolvents on the ground that they are unable to pay the debts of the pressing creditors. It was also contended by the judgment-debtors that they have also filed I. A. No. 31 of 1932 for the appointment of an interim Receiver of the properties mentioned in I. P. No. 9 of 1982. It was also contended in the affidavit filed by the first petitioner herein that orders have been passed in the receiver petition on 9th March, 1982, and that the said order was communicated to the Official Receiver, Salem. Under the circumstances, the judgment-debtors/petitioners herein sought postponement of the sale of the property.

3. The executing Court, after, going through the affidavit and the counter-affidavit filed by the parties, passed the following order

> "Heard both sides. No notice or order recorded from official Receiver. Hence this petition is dismissed".

It is this order of the executing Court, that is assailed in the above revision petition.

4. Learned counsel Mr. S. Palaniswamy, appearing for the petitioner contends that when once the judgment-debtor brings to the notice of the executing Court that he has filed a petition for insolvency and that orders have been passed, it is the duty of the executing Court to stop further action in the execution proceedings. Reliance is placed by the learned counsel for the petitioners on an unreported judgment of Fakkir Mohammed, J. in *Kandaswamy Gounder and another* v. *P. Kandaswamy*[1], wherein the learned Judge has observed :

> "Therefore, it will not be conducive in the interest of both the decree-holder and the judgment-debtors to proceed with the sale of the property once the judgment-debtors filed an insolvency petition, which has been admitted in this case. In the circumstances, the adjudication proceedings have to be expedited and till suitable orders are passed in the insolvency petition, the sale of the property has to be deferred and if sold, the confirmation of the sale has to be deferred".

1. C. R. P. No. 2050 of 1981, dated 23rd December, 1981.

It is on the strength of this observation, learned counsel appearing for the petitioners contends that this revision has to be allowed and the order of the executing Court is erroneous.

5. This Court in *Venkata Sivayya* v. *Suryanarayana*[1], considered the powers of the executing Court enjoined under sections 28 (2), 51 and 52 of the Provincial Insolvency Act. Venkataramana Rao, J., has held that :

> "Section 52 directing the Court to deliver the property to be sold to the receiver in the insolvency did not apply in the absence of an application in that behalf by the receiver".

The learned Judge, dealing with section 28 (2) of the Act pointed out that on the making of an order of adjudication the whole of the property of the insolvent vests in the Court or in an Official Receiver appointed by the Court but until then the property of the insolvent is not divested from him and every creditor is free to have recourse to all available remedies against the debtor for realisation of his debt. It was observed in this decision at page 284.

> "I do not see why the mere fact of knowledge of insolvency should preclude the decree-holder from proceeding with the sale of the property. It may be that no order of adjudication would be made at all and if he should only stay his hand in the meanwhile, some other creditor might also attach the property and completely deprive him of the advantage of his having taken proceeding earlier. It may be by staying his hand and postponing the sale, the property might not fetch a fair price at a subsequent sale and it will be more advantageous to have an immediate sale and get a fair price and even though he may be deprived of the fruits of the execution, he will be entitled to get a fair dividend by reason of the property fetching a good price. Neither in principle nor in reason does it seem to me that notice of insolvency should operate as a bar to a decree-holder proceeding with the sale of the property".

1. (1938) 48 L. W. 279 : (1939) 1 M. L. J. 705 : A.I. R. 1938 Mad. 906.

6. In *Ponnudurai* v. *Kumaraswami Mudaliar*[1], Ramanujam, J., had an occasion to consider the scope of section 52 of the Provincial Insolvency Act. At page 254, the learned Judge has observed :

> "Section 52 will have no application when a Receiver had not been appointed in respect of the insolvent's properties. So an executing Court while executing a decree passed against the insolvent need not stay its hands merely on the admission of an insolvency petitioner".

This decision also makes it clear that just because the judgment-debtor has filed an insolvency petition before the Insolvency Court, it cannot be said that the execution proceedings should be stayed. In this case, it was not stated that the properties of the petitioners were taken by the Official Receiver in pursuance of the order of the Insolvency Court, nor the order of the Insolvency Court was brought to the notice of the executing Court. Under these circumstances, I am of of the view that the unreported judgment of Fakkir Mohammed, J.. in *Kandaswami Gounder and another* v. *P. Kandaswami*[2], relied on by the counsel appearing for the petitioners does not apply to the facts of this case nor does it lay down any law on this aspect. Following the earlier decision of this Court reported in *Ponnudurai* v. *Kumaraswami Mudaliar*[1], I am of the view that ihis Civil Revision Petition has no substance and has to be dismissed and it is accordingly dismissed. There will be no order as to costs.

R. S. —— *Petition dismissed.*

1. (1971) 2 M. L. J. 252.
2. C. R. P. No. 2053 of 1981, dated 23rd December, 1981.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

M. V. Sundarachar (died) and others ... *Appellants**

v.

Alagappan and others ... *Respondents*

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), sections 6 and 6-A —Bar of jurisdiction of Civil Courts.

A suit was filed for a declaration of title and also for injunction. The defendant raised the plea that be was a cultivating tenant and that the suit was not maintainable. On the question whether the civil Court had jurisdiction to entertain the suit,

Held. that under the Supreme Court decision in *Chinnamuthu* v. *Perumal*, (1970) 2 S. C. J, 616 : A. I. R. 1970 S. C. 1197, the two conditious, namely the defendant must be a cultivating tenant and that he must be entitled to the benefits of the Act would have to be satisfied. Again, under the decisions of the High Court in *Kuppuswami case*, (1958) 1 M. L. J. 208 and *N. S. Ramachandra Sastrigal's case*, (1961) 1 M. L. J. 335 a third condition is that the tenant must show that on a transfer of the proceedings to the Revenue Divisional Officer, he would be in a position to obtain one or the other of the statutory reliefs provided for in his favour under the Act. [*Para.* 9.]

These decisions make it clear that the civil Court will have to make preliminary enquiry as to whether the defendant is a cultivating tenant. If he is a cultivating tenant no other question would arise for consideration and the matter would have to be transferred to the statutory authority. If, however, he was not a cultivating tenant, having surrendered possession of the property prior to the suit, then he would be a person who is not entitled to the protection of the statute and the matter will have to be dealt

*S. A. No. 1360 of 1978. *14th December*, 1981.

with by the civil Court. It is thus necessary for the civil Court to frame an issue as to whether there was surrender of possession and the question will have to be considered in the light of the finding on the point. If it is found that he had not surrendered possession, then the proceedings will have to be transferred to the statutory authority. If he had surrendered possession the civil Court will consider appropriately and deal with the matter. [*Para.* 10.]

Cases referred to:—

Vellachami Ambalam v. *Paramasami Ambalam*, (1962) 2 M. L. J. 142; *Chinnamuthu* v. *Perumal*, (1970) 2 S. C. J. 616 : (1970) 2 An. W. R. (S. C.) 114 : (1970) 2 M. L. J. (S. C.) 114 : (1970) 2 S. C. R. 704 : A. I. R. 1970 S. C. 1197; *V. Kuppuswami* v. *Sri Subramaniaswami Devasthanam*, (1958) 1 M.L. J. 208 : 71 L. W. 303; *N. S. Ramachandra Sastrigal* v. *Kuppuswami Vanniar*, (1961) 1 M. L. J. 335 : 74 L. W. 167 : I. L. R. (1961) Mad. 672.

Appeal against the decree of the Court of the Subordinate Judge, Krishnagiri in Appeal Suit No. 57 of 1977, preferred against the decree of the Court of the District Munsif of Hosur in Original Suit No. 135 of 1975.

V. Krishnan and *P. Padmini*, for Appellants.

V. Rangarajan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants in this second appeal. The suit was originally instituted by one Sundarachar. But, on his death, plaintiffs 2 to 11 were brought on record as his legal representative. He leased item No. 1 of the suit property to the first defendant in the year 1965 for a period of one year. According to him, after the expiry of the period of lease, the first defendant surrendered possession of the land to him and he was cultivating the land on his own thereafter. It was alleged that the first defendant was claiming to be the cultivating tenant of the suit property so as to be entitled to possession thereof and he, therefore, came forward with the suit for declaration and injunction.

2. The first defendant in his written statement accepted that the property belonged to the plaintiff, but he denied that the lease in his favour was only for one year. He denied also that there was any surrender by him after the period of one year. According to him, he continued to be a tenant entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act, 1955. There were three other defendants who did not file any written statement.

3. The learned District Munsif framed only one issue, namely, whether the suit was maintainable in a civil Court, and found that the suit was not maintainable. Therefore, he transferred the suit to the file of the Revenue Divisional Officer purporting to act under section 6-A of the Tamil Nadu Cultivating Tenants Protection Act. On appeal, the learned Subordinate Judge, following the decision of this Court, reported in *Vellachami Ambalam* v. *Paramasami Ambalam*[1], confirmed thr decision of the trial Court and held that the civil Court had no jurisdiction to go into the question raised in the present case and the Revenue Divisional Officer alone was competent to decide the question of surrender of possession. Aggrieved by this judgment of the lower Appellate Court. this second appeal has been filed.

4. The only question raised in this second appeal is, whether the civil Court had no jurisdiction to entertain in the suit? Section 6 and 6-A are the material provisions to be considered and, therefore, they are reproduced below:

> "6. *Bar of jurisdiction of civil Court* —. No civil Court shall, except to the extent specified in section 3 (3) have jurisdiction in respect of any matter which the Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."
>
> *6-A. Transfer of certain suits to the Revenue Divisional Officer by civil Court:*—If in any suit before any Court for possession of, or injunction in relation to any

1. (1962) 2 M. L. J. 142.

land, it is proved by affidavit or otherwise that the defendant is a cultivating tenant entitled to the benefits of this Act, the Court shall not proceed with the trial of the suit but shall transfer it to the Revenue Divisional Officer who shall thereupon deal with and dispose of it as though it were an application under this Act and all the provisions of this Act shall apply to such an application and the applicant."

5. Mr. V. Krishnan, learned counsel for the appellants contended that in the present case the dispute between the parties is as to whether there was a surrender of possession by the first defendant after the expiry of the period of the lease. If there was such a surrender, then in his submission, the first defendant would have no right to claim the protection under the aforesaid statute and the civil Court would have jurisdiction to decide the suit.

6. Mr. Rangarajan, learned counsel for the respondents submitted that the question as to whether the 1st defendant is a cultivating tenant or not is exclusively within the scope of the jurisdiction of the statutory authority and that the Courts below rightly transferred the case to the Revenue Divisional Officer for appropriate disposal.

7. The lower Appellate Court has relied on a decision of this Court in *Vellachami Ambalam* v. *Paramasami Ambalam*[1]. In that case the plaintiff claiming to be a cultivating tenant filed the suit for injunction. The defendant contended that the plaintiff had surrendered possession and that thereafter he was the cultivating tenant inducted into the property. The question that arose for decision was, whether this dispute could be decided by the Civil Court. Ananthanarayanan, J. (as he then was) observed that the Revenue Court alone could decide the question whether the alleged surrender of possession by the prior cultivating tenant was true and that the jurisdiction of the civil Court was clearly barred by section 6-A of the Act. It is this decision which is strongly relied on by the learned counsel for the respondents.

1. ((1962) 2 M. L. J. 142,

8. On the other hand, the learned counsel for the appellants brought to my notice, a decision of the Supreme Court in *Chinnamuthu* v. *Perumal*[1]. In that case, the plaintiff sued for declaration of his title, for possession and for realisation of arrears The defence was that the defendants had occupancy rights over the property. It was found that the plaintiff and his predecessors were ryots under the inamdar and that the defendants were only under-tenants under the lease granted by the predecessors-in-title of the plaintiff. In other words, it was held that the plaintiff was an occupancy tenant and the defendants were cultivating tenants. The matter reached the Supreme Court and the question considered by their Lordships was whether the Civil Court had jurisdiction to decree a suit in respect of possession in the light of the provisions of the Madras Cultivating Tenants Protection Act (XXV of 1955). After referring to the provisions of section 6 and section 6-A of the Act, their Lordships pointed out :

> "The clear import of section 6-A is that in any suit before any civil Court for possession if the defendant proves not only that he is a cultivating tenant but also that he is entitled to the benefits of the Act the civil Court is bound to transfer it to the Revenue Divisional Officer and cannot proceed to try and dispose it of itself. In the present case it had been found by the High Court as also by the trial Court that the appellants and wilfully denied the title ofthe respondent who is the landlord. They thus became disentitled to the benefits under the Act. Consequently, the civil Court had jurisdiction to proceed with the trial and there was no question of its transferring the suit to the Revenue Divisional Officer".

The Supreme Court noticed that there has been a consistent line of decisions of this Court that in order to attract the applicability of section 6-A, two conditions must be satisfied, namely, (i) the defendant must be a cultivating tenant within the meaning of

1. (1970) 2 S. C. J. 616 : (1970) 2 An. W. R. (S. C.) 114 : (1970) 2 M. L. J. (S. C) 114 : (1970) 3 S. C. R. 704 : A. I. R. 1970 S. C. 1197.

the Act and (*ii*) he should be entitled to the benefits of the Act. If both these conditions were not satisfied no question of any transfer under section 6-A will arise. It was added by their Lordships.

> "The civil Court may have to determine, for the purpose of coming to the conclusion, whether a suit has to be transferred under section 6-A, certain questions which are within the jurisdiction of the revenue Court under the Act".

Reference was also made in the Supreme Courts decision to another decision of this Court's in *V. Kuppuswami* v. *Sri Subramaniaswami Devasthnam* and also to the case of *N. S. Ramachandra Sastrigal* v. *Kuppuswami Vanniar*[2], in which a third condition is also required to be satisfied under section 6-A. The third condition was that the tenant must show that on a transfer of the proceedings to the Revenue Divisional Officer he would be in a position to obtain one or the other statutory reliefs provided for in his favour under the Act. Their Lordships did not think it necessary to deal with the third requirement mentioned in the aforesaid decision.

9. As far as I am concerned, I have to consider not only the decision of the Supreme Court, but also the decisions of this Court cited above. Under the Supreme Court's decision, the twin conditions, namely, the defendant must be a cultivating tenant and that he must be entitled to the benefits of the Act would have to be satisfied Under the aforesaid decision of this Court, the third condition, namely, the tenant must show that on transfer of the proceedings to the Revenue Divisional Officer, he would be in a position to obtain one or the other statutory reliefs provided for in his favour under the Act.

10. These decisions make it make it clear that the Civil Court will have to make a preliminary enquiry as to whether the defendant is a cultivating tenant. If he is a cultivating tenant, no other question would arise for consideration and the matter would have to be transferred to the statutory authority. If, however, he was not a cultivating tenant, having surrendered possession of the property prior to the suit, then he would be a person who is not entitled to the protection of the statute and the matter will have to be dealt with by the civil Court. It is thus necessary for the trial Court to frame an issue as to whether there was surrender of possession and the question will have to be considered in the light of the finding on this point. If it is found that he had not surrendered possession, then the proceedings will have to be transferred to the statutory authority. If he had surrendered possession the civil Court will consider appropriately and deal with the matter.

11. The second appeal is accordingly allowed, the judgments of of the trial Court and the lower appellate Court are set aside and the matter restored to the file of the trial Court for disposal in accordance with law and in the light of the discussions above. There will be no order as to costs. Court-fee paid on the memorandum of second appeal will be refunded.

R. S. —— *Appeal allowed.*

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1. (1958) 1 M. L. J. 208 : 71 L. W. 303.
2. (1961) 1 M. L. J. 335 : I. L. R. (1961) Mad. 672 ; 74 L. W 167.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

R. Govindasamy and others ... *Petitioners**

v.

T. R. Rajagopalan and others ... *Respondents*

Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), section 3 (4)—Petition for eviction by landlord before Revenue Court—Salient aspects to be considered by Revenue Court under the Act.

The salient aspects, which a Revenue Court, under Act XXV of 1955 should take into account, in a petition for eviction by a landlord are:

(1) Under section 3 (4) (*b*) of the Tamil Nadu Cultivating Tenants Protection Act, the first order to be passed after hearing parties, should relate to a determination being made as to whether, a default has been committed as contemplated under the Act for passing an order of eviction. If there is no default, the application for eviction has to be dismissed. If there is default in payment of rent, then the Revenue Divisional Officer shall give reasons, if he decides in his discretion, after taking into consideration the relative circumstances of landlord and tenant, not to give time to make up the deficiency, but to order eviction straightway.

(2) If the Revenue Divisional Officer in the first instance after hearing parties, decides in his discretion to grant time to the defaulting cultivating tenant, he should take into account the relative circumstances of the landlord and the tenant and fix such reasonable time as he may find it necessary to grant, and furnish reasons therefor.

(3) There is no jurisdiction in the Revenue Divisional Officer to pass a composite order initially with a default clause, stating that on non-deposit of the amount within the time fixed, automatically eviction would follow. In all those cases wherein straightaway an order of eviction had not been passed, and the Revenue Divisional Officer had thought it is just and reasonable to grant time to make up deficiency, then the order of eviction has to be in two stages.

(4) When applications are filed for further extension of time, the Revenue Divisional Officer is bound to consider the circumstances put forth by cultivating tenant, and accordingly fix the time for deposit of the balance of amount. As held in *Chinnamarkathian's Case*, A. I. R. 1982 S. C. 137 and *Kuppannachettiar's Case*, (1981) 1 M. L. J. 136, it can be extended from time to time after notice to the landlord. An extension without notice to the landlord is not valid (*Bagirathi Ammal* v. *R. D. O. Erode*, (1957) 2 M. L. J. 11 (S. N), and equally an order of eviction by second stage order, without notice to the tenant is invalid (para 16) in *Chinnamarkathian Case*, A I. R. 1982 S. C. 137, Refusal to grant time should not be unjust and unreasonable or illegally declined.

(5) Stereo-typed or mechanical orders passed by filling up of blanks, would be tantamount to failure to exercise judicial functions and would be tantamount to non-compliance with the statutory directives, particularly when the Revenue Divisional Officer is directed to consider and grant such time as he may consider just and reasonable.

(6) Whenever extension of time is asked for, it would be prudent on the part of the Revenue Divisional Officer to call upon the parties to file the necessary application in writing, since there is no prescribed form for it. If they are not in a position to file such petitions, because of their illiteracy or inability to get assistance from others, then the statement made by them before him is to be recorded and their signatures or thumb impressions taken, so that it may not be disputed that, on no material, extension has been granted or in spite of certain oral pleas made, an order of eviction had been passed

*C. R. P. Nos. 1289 to 1292, 1877, 2044, 2329 and 2330 of 1981. *1st April, 1982.*

unjustly due to the landlord's demand for eviction.

(7) There is no concept of 'wilful default' and it should be understood only with reference to the default contemplated under section 3 of the Act.

(8) In the event of the landlord refusing to receive part-payment, the Revenue Court is bound to receive the amount and keep it in deposit. Refusal by landlords to receive part-payments, would not mean that an order of eviction should follow.

(9) If any agreed rent, had been arrived at and recorded, with a consent endorsement by both parties, thereafter no remission of the quantum of rent could be pleaded by the tenant, unless statutory enactment, so provides

(10) In the event of passing an eviction order refusing further extension of time to the tenant, the Revenue Divisional Officer should give reasons as to why any further extension of time for payment of rent cannot be granted and the matter justifies eviction to be ordered.

(11) In case of failure to deposit the amount by the date fixed an order of eviction cannot be passed on the same day, and it could be done only on the next day, since during the course of the entire day fixed for remittance, the tenant has the right to deposit. It is not as if failure deposit by the time the matter is called in the Revenue Court, would mean that a default has been committed. Hence in the event of failure to deposit by the date fixed, an order of eviction could be passed only on a subsequent date. [*Para.* 30.]

Cases referred to:—

Chinnayyan v. *R. Nagarathinam Pillai*, (1964) 77 L. W. 73 : (1964) 1 M. L. J. 309 ; *Chellammal Anni* v. *Masanan Samban*, (1965) 1 M. L. J. (S. C.) 18 : (1965) 1 S. C. J. 260 : (1965) 1 An. W. R. (S. C.) 18 : (1964) 7 S. C. R. 197 : A. I. R. 1965 S. C. 498 ; *Chinnamarkathian* v. *Ayyavoo*, A. I. R. 1982 S. C. 137 : (1982) 1 M. L. J. (S. C.) 17 ; *Kuppanna Chettiar* v. *Ramachandran*, (1981) 1 M. L. J. 136 ; *Venkitasamy Naicker*, v. *Ramasami Naicker*, (1964) 77 L. W. 553 ; *Kandan Moopan* v. *Arumugha Mudaliar*, (1963) M. L. J. 182 ; *Rajagopal Pillai* v. *Somasundaram Pillai*, (1964) 1 M. L. J. 238 ; *Meenakshi* v. *Ramani*, (1981) 2 M. L. J. 18; *Ponnalagu Ammal* v. *State of Madras*, I. L. R. 1953 Mad. 809 : (1953) 1 M. L. J. 410 : 66 L. W. 136 : A. I. R. 1953 Mad. 485 ; *Bagirathi Ammal* v. *R. D. O. Erode*, (1957) 2 M. L. J. 11 (S. N) ; *Ganapathy Padayachi* v. *Sri La Sri Subramania Desika Ganansambanda Pandarasannathi Avl. Dharmsapuram, Mutt*, (1965) 2 M. L. J. 14 : 78 L. W. 351.

Petitions under section 68 of Act XXV of 1955 praying the High Court to revise the orders of the Special Deputy Collector and Presiding Officer, Revenue Court, Kumbakonam passed in P. Nos. 109, 440, 442, 443, 491, 658, 354 and 353 of 1980 dated 16th March, 1981, 11th February, 1981, 4th February, 1981, 25th April, 1981 respectively.

B. Rajagopalan, V. Sridevan, T. Susindran-S. Y. Masood and *K. Prabhakaram*, for Petitioner.

B. Kumar, R. Loganathan and *D. C. Krishna, murthy*, for Respondents.

The Court delivered the following

ORDER—In these revision petitions, petitioners challenge the correctness of the orders of eviction passed under section 3 (4) *(a)* of Tamil Nadu Cultivating Tenants Protection Act, XXV of 1955 (herein after referred to as the Act). Facts in Civil Revion Petition 1289 of 1981 are referred to, for dealing with the common points taken in these revision petitions.

2. Petitioner herein is the tenant, against whom, the respondent filed a petition under section 3 (4) *(a)* of the Act, on the ground that he has been in arrears of rent for Faslis 1388 and 1389. When the petition was taken up for hearing on 19th July, 1980; he undertook to pay arrears of Rs. 2,900 which resulted in an interim order being passed on that date, granting time till 11th August, 1980. He paid Rs. 1,800 in all, during the 12 adjourned hearings between 22nd April, 1980 and 4th March, 1981; and then the case was adjourned 16th March, 1981 for making final payment,

When it was taken up for enquiry on that date, he paid Rs. 200 but respondent-landlord refused to receive it and pressed for eviction. As petitioner-tenant was in arrears of Rs. 1,100 it was construed as a wilful default on his part, resulting in the petition being allowed, and a direction issued for handing over possession of the petition-mentioned properties. Identical orders have been passed in C. R. P. Nos. 1290, 1291 and 1292 and of 1981. Section 3 (4) (*d*) of the Act is to the following effect :

> "On receipt of such application, the Revenue Divisional Officer shall, afte-giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass in order either allowing the application or dismissing it and in a case falling under clause (2) or clause (*aa*) of sub-section (2) in which the tenant had not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer say allow the cultivating tenant such time as he considers just and reasonable having regard to the relative circumstances of the landlord and the cultivting tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section (3) (*b*). If the cultivating tenant fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction."

3. One of the main points taken in these proceedings, is, whether in granting extension of time for depositing the arrears of rent, it is obligatory on the part of Revenue Divisional Officer to consider the relative circumstances of landlord and cultivating tenant, for granting such time as he considers just and reasonable, or only once the relative circumstances of landlord and cultivating tenant is to be considered, and thereafter only the circumstances pleaded by the tenant for non-compliance of the order is to be taken into account, for extension of time to be granted or rejected.

4. Several counsel appearing for tenants pleaded, that, the routine order passed, with the same words used in every case, without any application of mind to what have been pleaded by the respective parties, had resulted in arbitrary order being passed instead of complying wiih the requirements of this section extracted above. They plead that whenever necessity arises, to consider whether the tenant should be granted time or not, the Revenue Divional Officer is bound to take into account the relative circumstances of landlord and tenant, and only thereafter to pass orders of eviction, if he considers that just and reasonable grounds do not exist for any further extension of time.

5. As for section 3 (4) (*b*), it consists of three sentences, First sentence consists of two stages. When an application is filed, Reveuue Divisional Officer, after giving a reasonable opportunity to both landlord and cultivating tenant, to make their representations, is enjoined to hold a summary enquiry and pass orders, either allowing or dismissing the application. This part of the duty to be performed by him, is confined to determination as to whether tenant had committed a default as contemplated under the Act. In such of those cases, where the defanlt as provided under the Act, has not been occasioned, the application of the landlord has to be dismissed as premature, or on the ground that the circumstances pleaded have not been established.

6. In *Chinnayyan* v. *R. Nagarathinam Pillai*[1], this Court held :

> "The terms of the section clearly show that in all cases of default where the Revenue Divisional Officer considers that an opportunity should be given to the tenant to pay up the arrears, first stage of the proceedings is where the Court finds that the default has been committed and decided to give an opportunity to the tenant to pay up the arrears. The second stage is, when the tenant performs or fails to perform his

1. (1964) 77 L. W. 73.

obligation. These two stages envisaged by the section cannot obviously be rolled up into one and a single combined order passed "

7. In *Chellammal Anni* v. *Masanan Sambon*[1], while analysing the section in the Act, it is stated as follows :—

"... . Even though the appellant was not agreeing to the division of the crop, the respondent did not act under section 3 (3) as he should have and instead sent a money order. That gave the appellant a cause of action to make an application under section 3 (4) of the Protection Act. But even though the appellant was entitled to make application under section 3 (4) of the Protection Act, the Revenue Divisional Officer was not bound to evict the tenant for clause (*b*) of section 3 (4) gives him a discretion to give time to the tenant to pay the arrears having regard to the relative circumstances of the landlord and the cultivating tenant. This clearly means that the Revenue Divisional Officer has to take into account the circumstances of each case and then exercise his discretion, whether he should give time to the tenant or not. In the present case the Revenue Divisional Officer did not consider the question as he took the view that he should not exercise the discretion in favour of the respondent because he had not acted as he should have acted and deposited the amount under section 3 (3) in Court. This view of the Revenue Divisional Officer is in our opinion patently incorrect. Now if the respondent had acted as he should have acted and made a deposit under section 3 (3) of the Protection Act, the matter would have been dealt thereunder. The Court which includes the Revenue Divisional Officer would then have to consider whether the amount deposited was correct and if it was deficient the Court was bound to give time to the tenant to make up the deficiency. It is only when the deficiency is not made good within the time allowed that the landlord would have the right to make an application under section 3 (4) for eviction. It is clear therefore that the discretion allowed under clause (*b*) of section 3 (4) only comes into play where the tenant for some reason or the other has not made a deposit under section 3 (3). To hold therefore—as the Revenue Divisional Officer seems to have held—that the discretion will not be exercised in favour of the tenant because he has failed to make a deposit under section 3 (3) of the Act is a patent violation of the provision in clause (*b*) of section 3 (4) as to the exercise of discretion."

8. Taking note of what a tenant has to comply with, to avoid eviction. it was held that if the deposit had not been made under section 3 (3) of the Act, it then gave the landlord a cause of action to make an application under section 3 (4) of the Act, and that it was left to discretion of the Revenue Divisional Officer to give time or not to pay the arrears taking into account the circumstances of each case and having regard to the relative circumstances of the landlord and the cultivating tenant.

9. In *Chinnamarkathian* v. *Ayyavoo*[1] in considering the scope of the order that could be passed under section 3 (4) (*a*) and (*b*) of the Act, it was held that that the order passed by Revenue Divisional Officer, who functions as a Court, as provided under section 6 (*b*) of the Act, is a judicial proceeding and he should judicially appraise the circumstances pleaded. While passing orders under section 3 (4) (*b*), he has to determine all the issues which arise in the case and record a finding on each of them and make a speaking order. On the landlord filing a petition under section 3 (4) of the Act, in view of the word "may" used in section 3 (4) (*b*) of the Act, in relation to the grant of time, in contradistinction to the word "shall" used in section 3 (3) (*b*) of the Act, it is left to the discrection of Revenue Divisional Officer, to grant time or straightway proceed to pass an order of eviction, if circumstances so warrant. The reason for this conclusion is stated as follows:—

".... The difference in the language used by the legislature is significant and not without purpose. The intention of the legislature appears to be that normally a

1. (1964) 7 S. C. R. 197 : (1965) 1 S. C. J. 260 : (1965) 1 M. L. J. (S. C.) 18 : (1965) 1 An. W. R. (S. C.) 18 : A. I. R. 1965 S. C. 498.

1. (1982) 1 M. L. J. (S. C.) 17 : A. I. R. 1982 S. C. 137.

defaulting tenant must seek the help of the Court all by himself and that if he does so he must be protected; but that a defaulting tenant who waits for payment of rent till he is sought to be evicted by the landlord is not necessarily entitled to the same protection. Circumstances may exist which may place him at par with a tenant covered by sub-section (3) but then it may not necessarily be so. That is why it is left to the discretion of the Revenue Divisional Officer to grant time to the cultivating tenant or to deny him that opportunity. An example of a case in which no time should be allowed would be that of a tenant who, although in affluent circumstances at all relevant points of time, has failed to make payment of rent year after year in spite of repeated demands from an otherwise indigent landlord and whose conduct is, therefore, contumacious. calling for no sympathy or concession. The extension to him of the same facility which is accorded to a willing tenant under sub-section (3) would be uncalled for and in fast unjust.

Nor do I find why the word "may" occurring in clause (*b*) of sub-section (4) be not given its ordinary meaning as denoting the conferment of a discretion on the R. D. O. and be equated with "shall" so as to make it obligatory on him to grant time to the cultivating tenant.

Subject to the disagreement expressed by me above I concur with the judgment of Desai, J.".

10. This conclusion on the scope of the powers of the Revenue Divisional Officer enables him to pass two kinds of order. He can pass an order of eviction straightway, if on holding the enquiry under section 3 (4) (*b*) as envisaged in the earlier part of it, he comes to the conclusion that the relative circumstances of the landlord and tenant are such that the matter does not call for any time to be granted to the tenant and that the only deserving order to be passed is an order of eviction. The other type of order is, when he comes to the conclusion that the default has been committed, but circumstances warrant grant of time to the tenant. Then he can only pass a preliminary order fixing time within which the amount is to be deposited. He cannot pass a relled up or composite order, stating that in the event of non-depositing the amount within the time granted eviction would follow. It is only after a preliminary order he would have powers to pass the order of eviction, in the event of the tenant not paying the amount on time. If he is to ask for extension of time, then such an application will have to be considered on its merits.

11. Hence, in the light of the decision rendered by the Supreme Court, section 3 (4) (*b*) contemplates an order of eviction being passed by the Revenne Divisional Officer while holding the first enquiry, without grant of any time whatsoever for payment of the arrears of rent. While passing such an order, relative circumstances of the landlord and the tenant should be taken into account and the order must be a speaking order furnishing reasons for the conclusion arrived at. While passing such an order, there would be no question of consideration of time being granted for payment of arrears. In the extract above made, it has been pointed out that there may be instances where a cultivating tenant may systematically avoid paying rent year after year, whereas, landlord may be an indigent person, and if such tenants are to the granted time, then it would be unjust. It is on this aspect alone, two of the learned Judges, who formed the majority of the opinion have disagreed with the view of Desai, J., and in other respects, they have concurred with his decision.

12. In such of those cases wherein, the Revenue Divisional Officer comes to the conclusion in the first enquiry that the matter merits grant of time to the cultivating tenant, then he cannot pass a rolled up order. He has to fix a time and stop there. In respect of such categories, it has been held in the said decision as follows:—

"The Officer, concerned has to, (*i*) give an opportunity both to the landlord and the cultivating tenant to make a representation; (*ii*) hold a summary enquiry into the matter to defermine the rent in arrears. After having determined the rent in arrears the Revenue Divisional Officer has to

to hold further enquiry into the relative circumstances of the landlord and the cultivating tenant and the circumstances which have a bearing on the issues and the circumstances relatable to the need of the landlord for rent and the present paying capacity of the tenant ...."

13. If, as stated above, he considers that it is not a fit case were the tenant should be granted time for payment of balance of rent, he has the discretion and the jurisdiction to pass an order of eviction straightway. But, if he considers that the tenant could be granted time, then "after taking into consideration the circumstances of both the landlord and the tenant thus ascertained, the Revenue Divisional Officer has to decide what length of time has to be given to the tenant to deposit the rent found in arrears and at that stage the proceeding must stop, ... His order fixing the time must show on the face of the record that he made the necessary enquiry as to the relative circumstances of the landlord and the cultivating tenant and after evaluating the circumstances placed before him by both sides, he would determine the length of time, and the order fixing the time must at least give some indication as to what weighed with him in fixing the certain time. which he fixed in the given case". If the tenant deposits the rent or pays up the rent the application for eviction would have to be dismissed. If on the other hand, landlord points out that the tenant" has failed to comply with the order made by the Court and if after notice to the tenant and in the absence of a request for extension of time", then it would entail passing of an order of eviction. Even at this stage, the request has to be judicially examined.

14. In the earlier decision rendered by the Supreme Court in *Chellammal Anni* v. *Masavan Samban*[1], which has not been cited before the Supreme Court in the later decision, it was held that when a tenant in default fails to take advantage of section 3 (3) of the Act, it gave the landlord a cause of action to make an application under section 3(4) of the Protection Act. But even though the appellant was entitled to make an application under section 3 (*a*) of the Protection Act, the Revenue Divisional Officer was not bound to evict the tenant, for clause (*b*) of section 3(4) gives him a discretion to give time to the tenant to pay the arrears having regard to the relative circumstances of the landlord and the cultivating tenant.

15. This clearly means that the Revenue Divisional Officer has to take into account the circumstances of each case and then exercise his discretion whether he should give time to the tenant or not. Therefore the discretion allowed under clause (*b*) of section 3 (4) only comes into play where the tenant for some reason or the other has not made a deposit under section 3 (3).

16. In the light of the pronouncements made by the Supreme Court and what has been held by the Division Bench of this Court above referred to, the Revenue Divisional Officer while exercising powers under section 3 (4) (*b*) of the Act, has the jurisdiction to straightway pass an order of eviction, after hearing both landlord and tenant and considering their relative circumstances, and while exercising such discrection, he must act judicially and pass a speaking order. A defaulting cultivating tenant cannot as a matter of right demand that he should be granted time. In such of those cases where the Revenue Divisional Officer finds after taking into account the relative circumstances that the cultivating tenant, deserves time to be granted, he has to pass only a preliminary order and stop there. Thereafter, if the tenant does not pay the deficit rent within the time granted or within the extension of time granted from time to time, Revenue Divisional Officer could pass an order of eviction after giving reasons for refusal to extend time, and such orders also must be passed judicially, indicating therein as to why further extension cannot be granted.

17. In this context, it will be useful to refer to the decision of the Division Bench of this Court in *Kuppanna Chettiar* v. *Ramachandran*[1], wherein, the question arose as to whether a deficit of rent made pending disposal of a Civil Revision Petition filed under

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1. (1964) 7 S. C. R. 197 : (1965) 1 S. C. J. 260 : (1965) 1 M. L. J. (S. C) 18: (1965) 1 An. W. R. (S. C.) 18 : A. I. R. 1965 S. C. 498.

1. (1981) 1 M. L. J. 136,

section 6-B of the Act, could amount to a deposit made within the time stipulated by the order of the Revenue Divisional Officer, and it was held that, any such doposit made, in this Court, could not be treated as a deposit made within the time fixed by the Revenue Divisional Officer. On the point taken as to whether the civil revision petition filed under section 6-B of the Act can be treated as a continuation of the proceedings initiated before the Revenue Divisional Officer, it was held that, even assuming that it is a continuation of those proceedings, the High Court, in exercise of its revisional powers cannot allow such deposits to be made so as to destroy or negative the orders passed by the Revenue Divisional Officer. It is only in such of those cases where the orders suffer from any of the vitiating factors mentioned in section 115 of the Code of Civil Procedure, this Court can have jurisdiction to interfere with such orders.

18. In the said decision, the need for grant of time for depositing the arrears, had been taken note of, and held that, if Revenue Divisional Officer unreasonably or illegally declines to extend time applied for the deposit of the amount, then this Court would have the necessary jurisdiction, in proper cases, to interfere and extend the time for payment. In paragraphs 24 and 25 of the judgment, this aspect has been dealt with to hold that :

> "The question that has to be considered in respect of the default is, not with reference to any date subsequent to the order of the Authorised Officer, but with reference to the date fixed by the Officer prior to his passing the order for eviction. The section itself contemplates the Revenue Divisional Officer giving an opportunity to the tenant to deposit the arrears of rent within such time as he considers just and reasonable, and only if the cultivating tenant fails to deposit the same as directed, the Revenue Divisional Officer can pass an order for eviction."

Again it is held:

> "We make it clear that, if the tenants had applied to the Authorised Officer for extension of time for the payment of the rent, and the Authorised Officer had declined, and the tenants had complained against such order, this Court may, in proper cases, have power to interfere with the order complained against and extend the time for payment; that is far different from saying that the payment made pursuant to a conditional order of interim stay passed by this Court will be payment made in compliance with the directions already given by the Authorised Officer before he passed the final order for eviction against the petitioners herein though such payment be taken into account in cases indicated by us above, namely, where the tenant approaches the High Court complaining that the Revenue Divisional Officer has unreasonably or illegally declined to extend the time applied for by him for the deposit of the amount".

19. As to whether Revenue Divisional Officer can only fix as unalterable or inflexible date only once for payment of the arrears determined by him, or has the jurisdiction to grant time more than once, in *Venkitasamy Naicker* v. *Ramasami Naicker*[1], it was held that there may be a variety of circumstances by reason of which the tenant might find it difficult to comply with the direction to deposit the arrears by the date fixed, and that a mechanical application of the provisions of the section cannot be resorted to for eviction, as the object of the section is to avoid eviction wherever possible. There can be no inflexible and unalterable date, and therefore, the time to be granted could be further extended, if circumstances warrant.

20. The earlier decisions of this Court in *Kandan Moopan* v. *Arumugha Mudaliar*[2], and *Rajagopal Pillai* v. *Somasundaram Pillai*[3], taking a contrary view to the effect that, once a date is fixed, it cannot be extended could not find acceptance for the reasons stated in *Venkitasamy Naicker* v. *Ramaswamy Naicker*[1]. In the light of what has been held therein to the effect that there can be further extensions of time granted, there could be no dispute raised to the proposition, that

1. (1964) 77 L. W. 553.
2. (1963) 1 M. L. J. 182.
3. (1964) 1 M.L. J. P. 238.

Revenue Divisional Officer can in cases wherein preliminary orders were passed extend the time for arrears to be deposited more than once, if circumstances so warrant.

21. Mr. Sridevan, learned counsel for the petitioner in C. R. P. No. 1877 of 1981 would plead that the words "may allow the cultivating tenant such time as he considers just and reasonable" would not mean grant of time, only once, but would comprehend time being allowed, more than once.

22. When the guiding factors are 'just and reasonable' certainly, if on every adjourned date, tenant is able to establish just and reasonable circumstances existing for further time to be granted, it will be available to the tenant. This analysis is made for deciding the point, as to whether the expression "having regard to the relative circumstances of the landlord and the cultivating tenant" would be confined only to grant of time given for the first time, or would be a relevant factor, whenever further extensions are granted for depositing the arrears of rent. Neither the decisions of the Supreme Court, nor the Division Bench decisions of this Court above referred to, are to the effect that the Revenue Divisional Officer is precluded from granting time more than once. In fact, the Division Bench has held that, if the extension asked for, is unreasonably or illegally declined, it will be open to the aggrieved parties to move this Court for relief.

23. In *Chellammal Anni* v. *Masanan Samban*[1] dealing with the powers of this Court as to how far, it could interfere with such orders, it was held that if Revenue Divisional Officer, patently commits an error of law, then in the interest of justice, High Court could interfere with such orders. Further, when there is a failure to exercise jurisdiction vested in him under law, then the High Court will be justified in interfering with its order even under section 115 of the Code of Civil Procedure. Hence, if an order of eviction is passed by a Revenue Divisional Officer, after preliminary order procedure is followed, without considering the reasonable request for extension of time, such orders could be interferred with by this Court. Now that the Supreme Court has held that such orders are judicial orders and the Officer should give reasons for refusal to grant time, it is incumbent on the Revenue Divisional Officer, before passing an order of eviction to give reasons as to why the request for further extension of time asked for by the cultivating tenant could not be acceded to.

24. The other points which have been taken are the usual points which repeatedly come before Court and in spite of more than one order passed, Revenue|Divisional Officers are passing orders overlooking the directives of this Court.

25. The first aspect touched upon is that, Revenue Courts adopted a stereo-typed form in passing orders. Except to fill up the portions relating to amount involved and the extensions granted, there is no application of mind to circumstances of the case. In C. R. P. No. 1289 to 1292 of 1981, though all these petitions pertain to different parties, the sequence of sentences, the words used, are identcial. It is unfortunate that while exercising quasi-judicial functions, the statutory authority, should dispose of petitions filed against cultivating tenants, in such a cursory manner, when several beneficial Acts have been enacted for their benefits. In the decision in *Meenakshi* v. *Ramani*[1], in paragraph 11 the learned Judge has referred to adoption of mechanical means for a routine disposal of matters. Even as early as *Ponnalagu Ammal* v. *State of Madras*[2], and in several decisions rendered thereafter, this Court has deprecated this practice, but in spite of it, this practice is persistently adopted by Revenue Courts in dealing with the valuable rights of cultivating tenants.

26. Now that in *Chinnamarkathian's case*[3], in more then one place it has been held that the order of eviction, is a judical order and it must be a speaking order giving reasons for the conclusions arrived at on the issues

1. (1965) 1 M. L. J. (S. C.) 18 : (1965) 1 S. C. J. 260 : A. I. R. 1965 S. C. 498.

1. (1981) 2 M. L. J. 18.
2. (1953) 1 M. L. J. 410 ; 65 L. W. 136 : I L. R. (1953) Mad. 809 : A. I. R. 1953 Mad. 485.
3. (1982) 1 M. L. J. (S. C.) 17 : A. I. R. 1982 S. C. 137.

involved in the matter, henceforth, there is no scope for Revenue Divisional Officer to pass stereotyped orders.

27. A comprehensive consideration being made in this decision, it is made clear that in spite of what has been held in this decision, in future, if this sort of mechanical application in passing orders is found, then it would be treated as a knowing advoidance to abide by the decisions of this Court, and it may lead to this Court taking proceedings for disobedience of orders of this Court. When the statute compels the Revenue Divisional Officers to pass orders, taking into account just and reasonable circumstances; they cannot pass orders without spelling out or indicating as to what are the circumstances which are taken into account for the eviction order being passed. Hence passing of orders, using more or less a stereo-typed form, as could be made out from a reading of the four orders above referred to, has resulted in the said orders having been passed without proper application of mind, resulting in the orders being remitted for fresh consideration, which unnecessarily leads to the unfortunate tenants being subjected to further expenditure in defending the petitions.

28. The next aspect is that, the plea for extension of time is invariably rejected by recording that the landlord refuses to receive part-payment and presses for eviction. This refusal is an irrelevant factor. If he is not for receiving part payment the tenant has the right to deposit the said amount into Revenue Court, which ought to have been received by it. As for the balance of the amount, Revenue Divisional Officer is bound to consider the circumstances pleaded for extension of time and then pass suitable orders of eviction. If the tenant is able to establish that the circumstances pleaded by him justify grant of further extension of time even though the landlord may refuse to receive part payment, the Revenue Divisional Officer is duty bound to grant extension on the merits of the matter.

29. The next aspect pleaded is the concept of 'wilful default' being inducted in such orders, as if 'wilful default', contemplated under Act XVIII of 1960 and like enactments, is relevant. None of the sections in Act XXV of 1955 refers to the concept of 'wilful default'. What has to be considered is whether there has been a default committed, as provided under the Act. It is this aspect alone that could be referred to and relied upon for holding that there has been a default in payment of arrears of rent, and no other factor. Hence in such orders, the concept of 'wilful default' has no place whatsoever.

30. When the sub-section enjoins the Revenue Divisional Officer to exercise his discretion in granting time, the order shall disclose, in what manner the aspect of discretion has been exercised. When it states that, consequent to the landlord refusing to receive part-payment, he proceeds to hold it as wilful default it necessarily means that the Revenue Divisional Officer had left to the landlord to decide about the order of eviction, and on his own, he has not exercised his mind. In exercising quasi-judicial powers, the statutory authority, while using his discretion, has to indicate it in the order, and give reasons as to what has prevailed in its mind while refusing to grant extension of time. In the absence of any such discussion, the orders passed, do not satisfy the requirements of the provisions of the Act. Hence, on this aspect also, the orders under challenge having not disclosed as to in what manner the discretion has been exercised, suffer from this infirmity as well.

31. Therefore to summarise as to what are the salient aspects, a Revenue Court, under Act XXV of 1955 should take into account, they are enumerated hereunder :

(1) Under section 3 (4) (*b*) of the Act, the first order to be passed after hearing parties, should relate to a determination being made as to whether, a default has been committed as contemplated under the Aet for passing an order of eviction. If there is no default, the application for eviction has to be dismissed. It there is default, then Revenue Divisional Officer shall give reasons, if he decides in his discretion, after taking into account the relative circum-

stances of landlord and tenant, not to give time to make up the deficiency, but to order eviction straightway, as held in *Chinnamarkathian's case*[1].

2. If Revenue Divisional Officer in the first instance after hearing parties, decides in his discretion to grant time to the defaulting cultivating tenant, he should take into account the relative circumstances of the landlord and the tenant and fix such reasonable time as he may find it necessary to grant, and furnish reasons therein.

(3) There is no jurisdiction in Revenue Divisional Officer to pass a composite order initially with a default clause, stating that on non-deposit of the amount within time fixed, automatically an eviction would follow. In all those cases wherein straightaway an order of eviction had not been passed, and Revenue Divisional Officer had thought it is just and reasonable to grant time to make up deficiency, then the order of eviction has to be in two stages as hold in *Chinnayyan* v. *Nagarathinam*[2] and *Chinnamarkathian's cases*[1].

(4) When applications are filed for further extension of time, Revenue Divisional Officer is bound to consider the circumstances put forth by cultivating tenant, and accordingly fix the time for deposit of the balance of amount. As held in *Chinnamarkathian's case*[1], and *Kuppanna Chettiar's case*[3], it can be extended from time to time after notice to landlord. An extension without notice to landlord is not valid *Bagirathi Ammal* v. *Revenue Divisional Officer, Erode*[4], and equally an order of eviction by second stage order, without notice to tenant is invalid in *Chinnamarkathian's Case*[1]. Refusal to grant time should not be unjust and unreasonable or illegally declined.

(5) Stereo-typed or mechanical orders passed by filling up of blanks, would amount to failure to exercise judicial functions and would be tantamount to non-compliance with the statutory directives, particularly when the Revenue Divisional Officer is directed to consider and grant such time as he may consider just and reasonable.

(6) Whenever extension of time is asked for, it would be prudent on the part of Revenue Divisional Officer to call upon the parties to file the necessary applications in writting, since there is no prescribed form for it. If they are not in a position to file such petitions, because of their illiteracy or inability to get assistance from others, then the statement made by them before him has to be recorded and their signatures or thumb impressions taken, so that is may not be disputed that on no material, extension has been granted or in spite of certain oral pleas made, unjustly an order of eviction had been passed due to the landlord demanding for eviction.

(7) There is no concept of 'wilful default and it should be understood only with reference to the default contemplated under section 3 of the Act.

(8) In the event of landlord refusing to receive part-payment, Revenue Court is bound to receive the amount and keep it in deposit. Refusal by landlords to receive part-payments, would not mean that an order of eviction should follow.

(9) If any agreed rent, had been arrived at and recorded, with a consent endorsement by both parties, thereafter no remission of the quantum of rent should be pleaded by the tenant, unless any statutory enactment, so provides.

(10) In the event of passing eviction order refusing further extension of time to the tenant, the Revenue Divisional Officer should give resons as to why any further extension of time for payment of rent cannot be granted. and the matter justifies eviction to be ordered.

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1. (1982) 1 M. L. J. (S. C.) 17: A. I. R. 1982 S. C. 137.
2. (1964) 1 M. L. J. 309 : 77 L. W. 73.
3. (1981) 1 M. L. J. 136.
4. (1957) 2 M. L. J. 11 (S. N).

11. In case of failure to deposit the amount by the date, fixed an order of eviction cannot be passed on the same day, and it could be done only on the next day, since during the course of the entire day fixed for remittance, the tenant has the right to deposit. It is not as if failure to deposit by the time the matter is called in the Revenue Court, it would mean that a default has been committed. Hence in the event of failure to deposit by the date fixed, an order of eviction could be passed only on subsequent date, as held in *Ganapathi Padayachi* v. *Sri La Sri Subramania Desika Gnanasambanda Pandarasannadhi Avl. Dharmapuram Mutt*[1].

32. In C. R. P. Nos. 1290 to 1292, 1877 and 2044 of 1981, the orders passed are identical to the order passed in C. R. P. No. 1289 of 1981.

33. In C. R. P. Nos. 2329 and 2330 of 1981, more or less the orders are similar to the order passed in C. R. P. No. 1289 of 1981. One of the points taken herein is that, the eviction order had been passed without noticing that the entire day was available for deposit of the amount as held in *Ganapathi Padayachi* v. *Sri-La-Sri Subramania Desika Gnanasambanda Pandara Sannadhi Avl., Dharmapuram Mutt*[1], and therefore the orders suffer from this added infirmity.

34. Therefore all these petitions are allowed resulting in the orders being set aside and the matters remitted to Revenue Court for passing suitable orders, bearing in mind what has been stated above and to avoid such repetition in any future order. No costs.

S.J. ——— *Petitions allowed.*

1. (1965) 2 M. L. J. 14 : 78 L. W. 351.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. Fakkir Mohamed, J.*

Pandurangan Chettiar and another ... *Petitioners**

v.

Ekambaram *Respondent.*

Civil Procedure Code (V of 1908), sections 47 and 151, Order 21, rules 66 (2) and 90—Petition for sale of immovable property attached before judgment—Sale papers filed along with the petition checked and found correct—Sale notice ordered—Initial notice not served on the judgment-debtor — Substituted service ordered—After such service judgment-debtor entered appearance counter-claiming benefits under Act XIII of 1980—Value of property given in the sale papers not specifically disputed—Claim of judgment-debtor rejected—Execution petition posted for payment of decree amount to 21st March, 1980—Adjournment of the petition by Court to 25th January, 1980—On 25th January, 1980, judgment-debtor absent and counsel not turning up—Order by District Munsif to proclaim and sell—Sale held on 25th February, 1980 and confirmed on 29th April, 1980—Petition by the judgment-debtor to set aside sale under sections 47 and 151, Civil Procedure Code, and under T. N. Act XIII of 1980—Sale set aside on grounds of material irregularity and sale being for a nominal sum—Revision by the decree-holder to High Court—Order set aside.

The decree-holder filed E. P. No. 444 of 1979 for the sale of the immovable property already attached before judgment on 9th January, 1975 in I. A. No. 58 of 1975 under Order 21, rule 66 of the Code of Civil Procedure. Along with the execution petition, the decree-holder had filed the sale papers and they were checked and found correct. Thereafter sale notice under Order 21, rule 66, Civil Procedure Code, was ordered. The initial notice was not served on the judgment-debtor

*C. R. P. No. 2068 of 1981. 11*th March*, 1982.

and substituted service was ordered. After substituted service of the sale notice was effected the judgment-debtor entered appearance through advocate and filed counter. In the counter the judgment-debtor claimed benefits of an agriculturist under Act XIII of 1980 and did not specifically dispute the value of the property given by decree-holder in the sale papers. The claim of the judgment-debtor was rejected and the execution petition was posted for payment of the decree amount to 21st January, 1980. From 21st January, 1980, the execution petition was adjourned to 25th January, 1980 as the presiding officer was on leave. On 25th January, 1980 the judgment-debtor was absent and his advocate failed to turn up. Thereupon the learned District Munsif passed an order to proclaim and sell. The sale was held on 25th February, 1980, and confirmed on 29th April, 1980. Subsequent by the judgment-debtor filed an application under sections 47 and 151 of the Code of Civil Procedure and under Act XIII of 1980. The Learned District Munsif allowed the execution petition and set aside the sale on the ground of undervaluation and there being a defect in the settlement of proclamation. The maintainability of the application was challenged in revision.

Held:—It is under Order 21, rule 66 (2), that proclamation has to be drawn up after notice to the decree-holder and the judgment-debtor and according to the Madras Amendment to rule 66 (2) the terms of proclamation shall be settled in Court after notice to the decree-holder and judgment-debtor. It is conceded that the notice contemplated under Order 21, rule 66 (2) has been served on the judgment-debtor. It is crystal clear, therefore, that for setting aside for sale for non-compliance of any of the provisions contained in Order 21, rule 66 (1), the application to set aside the sale must be filed only under Order 21, rule 90 Civil Procedure Code. [*Para*. 9.]

In this case, the judgment-debtor who entered appearance through an advocate has filed a counter after receiving the sale notice under Order 21, rule 66, Civil Procedure Code, and has not chosen to attack the value given by the decree-holder in the sale papers though he has filed a counter invoking the benefits of an agriculturist which was negatived. Therefore it cannot be said that the judgment-debtor had no opportunity to mention his own valuation. In the absence of the valuation of the judgment-debtor, probably the executing Court did not fix any upset price and left the proclamation to be published at the valuation as given by the decree-holder, At the most if the valution given by the judgment-debtor in E. A. No. 85 of 1980 is taken as correct, the defect will amount only to an irregularity in the sale proclamation, but not a void sale proclamation. Even then according to judicial decisions the application will be only under Order 21, rule 90 and not under sections 47 and 151, Civil Procedure Code. [*Para* 12.]

Cases refered to:—

Sankara Narayana v. *Sankara Iyer*, A. I. R. 1954 T. C. 226 ; *Appu* v. *Achuta Menon*, (1926) I. L. R. 49 Mad. 333 : 51 M. L. J. 165: 23 L. W. 652 : A. I. R. 1926 Mad. 750 ; *Natarajan* v. *Chamull Amarchand*, (1971) 1 M. L. J. 474 : 84 L. W. 36 ; *Dhirendranath Goral* v. *Sudhir Chandra Ghosh*, (1965) 1 S. C. J. 219 . (1964) 6 S. C. R. 1001 : A. I. R. 1964 S. C. 1300; *Satyanarayanamurthy* v. *Bhavanarayana*, I. L. R. (1957) A. P. 186 : (1957) 1. An. W. R. 233 : A. I. R. 1957 A. P. 185 ; *A. P. V. Rajendran* v. *S. A. Sundararajan*, I.L.R. (1980) 2 Mad. 1 : 93 L. W. 47 : (1980) 1 M. L. J. 198 : A. I. R. 1980 Mad. 123.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Kallakurichi, dated 22nd April, 1981, and made in E. A. No. 855 of 1980 in O. S. No. 25 of 1975.

T. V. Balakrishnan, for Petitioners.

M. Srinivasan and *K. Ramachandran*, for Respondent.

The Court delivered the following

JUDGMENT.—The Civil Revision Petition is directed against the order of the District Munsif, Kallakurichi, dated 22nd April, 1981, in E. A. No. 855 of 1980 setting aside the execution sale held on 25th February, 1980.

2. The decree-holder filed E. P. No. 444 of 1979 for the sale of the immovable property already attached before judgment on 9th January, 1975, in I. A. No. 58 of 1975 under

Order 21, rule 66 of he Code of Civil Procedure. Along with the execution petition, the decree-holder had filed the sale papers and they were checked and found correct. Thereafter sale notice under Order 21, rule 66, Civil Procedure Code, was ordered. The initial notice was not served on the judgement-debtor and substituted service was ordered. After substituted service of the sale notice was effected the judgment-debtor entered appearance through advocate and filed counter. In the counter filed, the judgment-debtor claimed benefits of an agriculturist under Act XIII of 1980 and did not specifically dispute the value of the property given by the decree-holder in the sale papers. The claim of the judgment-debtor was rejected and the execution petition was posted for payment of the decree amount to 21st January, 1980. From 21st January, 1980 the execution petition was adjourned to 25th January, 1980, as the Presiding Officer was on leave. On 25th January, 1980, the judgment-debtor was absent and the advocste failed to turn up. Thereupon, the learned District Munsif has passed the following orders:-

> "...... Hence no F. N. is necessary Today J. D. called absent. At request proclaim and sell on 25th February, 1980, F. Hg. 27th February, 1980."

The sale was held on 25th February, 1980, and confirmed on 29th April, 1980. Subsequently the judgment-debtor has filed E, A. No. 855 of 1980 under sections 47 and 151 of the Code of Civil Procedure and under Act XIII of 1980, on 19th June, 1980.

3. The learned District Munsif has allowed the execution application and set aside the sale on the ground that the property worth more than Rs. 7,500 was sold for a nominal amount of Rs. 2,510 and that the defect in the settlement of proclamation is materially irregular in the Court not fixing up the upset price and on the ground that if such an upset price had been fixed by the Court, the property would not have been sold for such a low price in this case. The learned District Munsif has found that the judgment-debtor is not entitled to the benefits of Act XIII of 1980 and he was of the opinion that the judicial decisions relied on by the decree-holder purchaser would not apply to the facts of the case, and that the judgment-debtor was entitled to file the petition to set aside the execution sale under sections 47 and 151 of the Civil Procedure Code.

4. The short point for consideration is, whether the petition to set aside the sale filed under sections 47 and 151 of the Code of Civil Procedure is sustainable?

5. The learned counsel for the revision petitioner has argued that the failure of the Court in not settling the proclamation of sale under Order 21, rule 66, Civil Procedure Code, is a proceeding in the course of the proclamation of sale, and that if there was any illegality or material irregularity in the settlement of the proclamation, the correct provision for filing an application to set aside the sale is Order 21, rule 90, Civil Procedure Code, ebut not sections 47 and 151 of the Civil Procedure Code. The learned counsel fee the respondent has cited the decisions reported in *Sankara Narayana* v. *Sankara Iyer*[1]. *Appu* v. *Achuta Menon*[2] and *Natarajan* v. *Chandmull Amarchand*[3]; in support of the argument that the execution Court had failed to serve the notice contemplated under Order 21, rule 66, Civil Procedure Code, before the prockamation proceedings to be taken by the executing Court and that the sale being a void one, can be set aside by means of an application under sections 47 and 151, Civil Procedure Code. When the attention of the learned counsel for the respondent herein was drawn to the fact that in those rulings the notice contemplated under Order 21, rule 66 had not been taken to the judgment-debtor, whereas in the present execution petition, which was filed within two years after the passing of the decree, sale notice contemplated under Order 21, rule 66, Civil Procedure Code, was taken after verifying the correctness of the sale papers filed by the decree-holder, the learned counsel immediately withdrew his reliance upon the above three judicial decisions.

6. Therefore, the respondent had to substantiate whether he can take protection

1. A. I. R. 1926 T. C. 226.
2. (1926) I. L. R 49 Mad. 333 : 23 L. W. 652 : 51 M. L. J. 165 : A. I. R. 1926 Mad. 715.
3. (1971) 1 M. L. J. 474 : 84 L. W. 361.

under sections 47 and 151 for setting aside the sale, which was held after service of notice to him instead of filing the sale setting-aside petition under Order 21, rule 90, Civil Procedure Code. The learned counsel for the respondent could not cite any direct decision on that point.

7. On the side of the revision petitioner, the learned counsel has cited several judicial decisions both of the Supreme Court and of this Court and other High Courts to the effect that once sale notice has been taken under Order 21, rule 66, Civil Procedure Code and sale is ordered, the person who seeks to set aside the sale has no other option but to invoke Order 21, rule 90, Civil Procedure Code, but not sections 47 and 151. In *Dhirendranatha Goral* v. *Sudhir Chandra Ghosh*[1], it was held by the Supreme Court that the non-compliance of the provisions of section 35 of the Bengal Money Lenders Act is a step in the proclamation proceedings and not a proceeding before the proclamation proceedings are taken and hence an application to set aside a sale for non-compliance of the provisions of section 35 of the said Act can be founded only under Order 21, rule 90 of the Civil Procedure Code. Section 35 of the Bengal Money Lenders Act provides that the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property as specified shall not be sold at a price, which is less than the price specified in such proclamation.

8. In the above case dealt with by the Supreme Court, the judgment-debtor was served with notice under Order 21, rule 66 of the Code of Civil Procedure, but did not file any objection to the valuation, though he got the sale adjourned a number of times promising to pay the decretal amount, but failed to do so, and that thereafter two of the properties were sold in Court auction. Then, one of the judgment-debtors filed an application in the executing Court for setting aside the sale under Order 21, rule 90 of the Code of Civil Procedure *inter alia* on the ground that section 35 of the Bengal Money Lenders Act was not complied with. The trial Court dismissed the application, and on appeal, the High Court held that though there had not been any substantial injury to the petitioner, the provisions of section 35 of the Bengal Money Lenders Act were mandatory and therefore the infringement of the said provision would invalidate the sale. It is under these circumstances, it was held by the Supreme Conrt that the non-compliance of the provisions of section 35 of the Bengal Money Lenders Act with reference to the sale proclamation would attract only an application under Order 21, rule 90 Civil, Procedure Code, for the purpose of setting aside the sale.

9. In *Satyanarayanamurthy* v. *Bhavanarayana*[1] the Full Bench of the High Court has held that if the proclamation is not properly drawn up, it cannot be said that there is a proper publication, because it would be publication of an improper proclamation of sale, and that a violation of the provision of rule 66 (2), ts only an irregularity in the publication or conduct of sale and hence an application under Order 21, rule 90 alone can be filed for setting aside such a sale. The following observations are found in paragraphs 21 and 22 at page 189 :

> "The principle to be deduced from these authorities is that breaches of the provisions of the Civil Procedure Code relating to execution against immovable properties commencing from their attachment down to their sale should all be dealt with under Order 21, rule 90, and not otherwise and that the order of confirmation under Order 21, rule 32, should give the final quietus to all objections which could be raised under Order 21, rule 90.
>
> If this view be correct, then there can be no doubt that a violation of the provisions of rule 66 (2) is only an irregularity in the publication or conduct of sale".

It is under Order 21, rule 66 (2), proclamation has to be drawn up after notice to the decree-holder and the judgment-debtor and according to the Madras Amendment of rule 66 (2), the terms of proclamation shall

1. (1964) 6 S. C. R. 1001 : (1965) 1 S. C. J. 219 : A. I. R. 1964 S. C. 1300.

1. (1957) 1 An. W. R. 233 : I. L. R. (1957) A. P. 186 : A. I. R. 1957 A. P. 185.

be settled in court after notice to the decree-holder and judgment-debtor. It is conceded that the notice contemplated under Order 21, rule 66 (2) has been served on the judgment-debtor. It is crystal clear, therefore, that for setting aside the sale for non-compliance of any of the provisions contained in Order 21, rule 66 (2), the application to set aside the sale must be filed only under Order 21, rule 90, Civil Procedure Code.

10. The Full Bench of the Madras High Court has adopted and expressed the same view in *A. P. V. Rajendran* v. *S. A. Sundararajan*[1]. In 93 Law Weekly case, the petition to set aside the sale mentioned *inter alia* on the ground that the upset price for Lot 1 had been improperly reduced and that the sale proclamation did not contain either the place or the date of auction, nor did it contain the quantum of tax payable on the property. With reference to the abovesaid particular facts, the Full Bench has held that the irregularity and defects found by the trial Court will attract only Order 21, rule 90, Civil Procedure Code, as the defects and irregularities are in the preparation and settlement of the sale proclamation and not under section 47. The relevant observations are found in paragraph 21 at page 54.

> "We have to, therefore, held in this case that the irregularity and the defects found by the trial Court will attract only Order 21, rule 90, Civil Procedure Code, as the defects and irregularity are in the preparation and settlement of the sale proclamation and not under section 47. As the sale in this case has been impeached only on grounds which attract Order 21, rule 90, the judgment-debtor cannot escape the period of limitation by framing his application as one under section 47".

11. In the present case also, we find that the application to set aside the sale has been filed under the cloak of sections 47 and 151 as well as Act XIII of 1980 beyond the period of limitation prescribed for an application under Order 21, rule 90, Civil Procedure Code. Evidently, the petitioner has desperately mentioned as far as possible all the provisions of law that can be taken to his rescue, though such provisions will not help him. The Full Bench has also relied on *Dhirendranatha Goral's case*[1], for the principle that, if the sale is sought is to be set aside on the ground of material irregularity in publishing or conducting the sale within the meaning of Order 21, rule 90, then section 47 cannot come into play at all. In the face of the catena of judicial decisions in favour of the revision petitioner, the learned counsel for the respondent herein is not able to cite any single direct judicial authority.

12. In fact, the learned District Munsif himself has observed in his Order in the beginning of paragraph 7 as follows:—

> "........Do, it is evidence that the suit property was sold at a very low price. Further in this case as per the amended rule 6 of order 21 no upset price was fixed by this court before ordering the sale. The property was sold to the price given by the decree-holder in the sale papers".

The judment-debtor, who entered appearance through an advocate has filed a counter after receiving the sale notice under Order 21, rule 66, Civil Procedure Code, and has not chosen to attack the value given by the decree-holder in the sale papers, though he has filed a counter invoking the benefits of an agriculturist, which was negatived. Therefore, it cannot be said that the judgment-debtor had no opportunity to mention his own valuation. In the absence of the valuation of the judgment-debtor, probably the executing Court did not fix any upset price and left the proclamation to he published at the valuation given by the decree-holder. At the most, if the valuation given by the judgment-debtor in E. A. No. 855 of 1980 is taken as correct, the defect will amount only to an irregularity in the sale proclamation, but not a void sale proclamation. Even then, according to the judicial decisions discussed supra, the application will lie only under Order 21, rule 90, Civil Procedure Code and not under sections 47 and 151, Civil Procedure Code. In the circumstances, the revision petitioner is allowed with costs. The order passed by the trial Court setting aside the sale is set aside. E. A. No. 855 of 1980 stands dismissed.

R. S. —— *Petition allowed.*

1 I. L. R. (1980) 2 Mad. 1 : (1980) 1 M. L. J. 198 : 93 L. W. 47:A. I. R 1980 Mad. 123.

1. (1965) 1 S. C. J. 219: (1964) 6 S. C. R. 1001.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Syed Abdul Rahman Marakayar ... *Appellant**

v.

Sahul Hameed and another ... *Respondents.*

Deed—Construction—Suit for declaration of possession and Injunction—Author conveying property by way of gift to daughter with certain purposes to be carried out—Author remaining huqdar during his lifetime—Restriction imposed on alienation—Provisions for performance of moulet andfateha—Nature of deed, whether wakf or settlement—Nomenclature not conclusive but relevant—Wakf not illusory.

Held :—Reading the several clauses of the document together and not in isolation, the dominant idea of the deed is to create a wakf and not merely to make a provision for the heirs or descendants. The twin objects mentioned in the document, namely, moulet and fateha could clearly constitute valid objects of the wakf. [*Paras.* 8, 13.]

The wakf cannot be said to be illusory merely because no particular stipulation has been made in regard to expenditure thereon and it would depend upon the largeness of heart of the huqdar. [*Para.* 15.]

The analysis of the deed, of wakf in the present case satisfied every test propounded in *V. M. Mohin* v. *Wakf Board*, (1967) 1 M. L. J. 65 : A. I. R. 1968 Mad. 243 and this is an added reason for holding that the deed concerned in the present case is a deed of wakf. [*Para.* 19.]

Cases referred to :

Kunhamutty v. *Ahmad Muballah*, (1935) 68 M. L. J. 107 : I. L. R. 58 Mad. 204 : 40 L.W. 806 : A. I. R. 1935 Mad. 29 ; *Mohiuddin Ahmed* v. *Sofia Khatun*, A. I. R. 1940 Cal. 501 ; *Sakunthala* v. *Rasheedunnissa*, (1974) 87 L. W. 266 : A. I. R. 1974 Mad. 309 ; *Ramanathan Chettiar* v. *Vada Levval Marakayar*, (1911) I. L. R. 34 Mad. 12 : 20 M L. J. 254 ; *Abdul Sattar Ismail* v. *Abdul Hamid Sait*, (1944) 2 M. L. J. 92 : I. L. R. (1945) Mad. 276 : A. I. R, 1944 Mad. 504 ; *V. M. Mohin* v *Wakf Board*, (1967) 1 M. L J. 65 : A. I. R. 1968 Mad. 243 ; *Kale Foula Sahib* v. *Nuseeruddin Sahib*, (1895) I. L. R. 18 Mad. 201 : 5 M. L. J. 40 ; *Mozher Hussain Khan* v. *Abdul Hadi Khan*, (1911) I. L. R. 33 All. 400 : *T. Mayil Ammal* v.*Pappa*, (1960) 1 M. L. J. 150: I. L. R. (1960) Mad. 487 : 73 L. W. 85: A. I. R. 1960 Mad. 318.

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli dated 29th July, 1980 in Appeal Suit No. 122 of 1979 preferred against the decree of the Court of the District Munsif, Tenkasi in Original Suit No. 124 of 1977.

A. Abdul Hadi, for Appellant.

T. R. Rajagopalan and *T. R. Rajaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The first plaintiff is the appellant in the second appeal which arises out of O. S. No. 124 of 1977 on the file of the Court of the District Munsif, Tenkasi. He along with the second plaintiff filed the said suit for a declaration of his possession and for a permanent injunction restraining the defendants from interfering with his possession and enjoyment.

2. The plaint averments are as under : The plaint property along with some other properties originally belonged to the Vavasimithi Pillai *alias* Mohideen Mithi Pillai Rowther. They were gifted on 1st September, 1943, by Vavasimithi Pillal *alias* Mohideen Mithi Pillai Rowther in favour of the second plaintiff, who is none other than his daughter (Exhibit A-1). The second plaintiff accepted the gift. In fact, the patta was also transferred in her name. The first plaintiff is the husband of the second plaintiff. The second plaintiff executed a deed of gift in favour of the first plaintiff on 8th December,

*S. A. No. 798 of 1981. 14*th October*, 1981.

1976 (Exhibit A-4). On and from the date of the gift deed, the first plaintiff was in possession and enjoyment of the properties. The defendants 1 and 2 are the sons of the plaintiffs. They sent a notice to the first plaintiff questioning the validity of Exhibit A-4 and stating that the alleged deed of gift in favour of the second plaintiff by Vavasimithi Pillai *alias* Mohideen Mithi Pillai Rowther was not an absolute gift, that on the contrary, it is a wakf under which they had been made the Huqdars and that, therefore, no title or interest could pass under Exhibi A-4. To this, a reply was issued by the first plaintiff on 19th April, 1977, denying these allegations. The plaintiffs contended that inasmuch as a cloud was sought to be cast over the title of the first plaintiff, it had become necessary for him to prefer the suit, and since there was also a threat from the defendants to destroy the standing crops the prayer for injunction is asked for.

3. In the written statement, it was averred that the suit was not maintainable. The deed dated 1st September, 1943, *viz.*, Exhibit A-1, is a wakf settlement. The first schedule property in Exhibit A-1 is given for "Rasool Ulla Mavullah Sheriff Dharmam". Out of the income from the first schedule property, the funeral ceremony of Vavasimithi Pillai and the annual ceremony of fateha should be performed permanently. Only the remaining income was to be taken by the Huqdars. The object of the wakf is a lawful one. The properties mentioned in the wakf have not been given by way of a gift. Apart from this, the deed of wakf also contained a restraint on alienation. Therefore, under Exhibit A-4, no title passed in favour of the first plaintiff. The said deed of gift is null and void.

4. An additional written statement was also filed stating that after the death of the second plaintiff on 21st August, 1978, the first plaintiff has no right to proceed with the suit. Hence, the suit abates. The right of succession did not subsist. The mode of devolution has been delineated in the deed of wakf, namely, Exhibit A-1.

5. The learned District Munsif, on a consideration of the oral and documentary evidence, dismissed the suit. Aggrieved by the dismissal of the suit. the first plaintiff preferred an appeal in A, S. No. 122 of 1980 on the file of the Sub-Court, Tirunelveli. The learned Subordinate Judge, concurring with the findings of the trial court, dismissed the appeal. Hence, against this concurring judgment, the present second appeal has been preferred.

6. Mr. Abdul Hadi, the learned counsel for the appellant, urges the following points for my consideration : (1) If a careful reading of Exhibit A-4 is done, it is very clear that what has been stipulated under the terms of the document was only a Moulet. In the instant case, we are concerned with the property forming the first schedule to this document, and in so far as the Moulet would consist of recitation of Koran unaccompanied by any other. Shortly, it would not constitute a valid object of the wakf. Even otherwise, the wakf is illusory, having regard to the fact that only a sum of Rs. 25/- has been directed to be spent on the same. As a matter of fact, the founder of the wakf himself has contemplated such a situation and he was to enjoy the remaining income, and after his death, the income was to be taken over by the daughter, and thereafter by her heirs. Therefore, having regard to the dominant object of the author of the wakf, it made provision only for the maintenance of the members of his family. (2) Mere recitation of Koran would not constitute wakf is evident from a reading of the decision of the Division Bench of this Court in *Kunhamutty* v. *Ahmad Muballah*[1]. (3) The Mussalman Wakf Validating Act also cannot be of any assistance to the defendants, because of the proviso contained to section 3 of the Act. In similar circumstances, it was held so in *Mohiuddin Ahmed* v. *Sofia Khatun*[2], *T. Mayil Ammal* v. *Pappa*[3] is a direct authority which goes a long way to help the appellant. In this case, it was stated there mere recitation of Koran over the tomb of a person would not amount to a valid object of the wakf The decision in *Sukunthala* v. *Rasheedunnissa*[4], is an authority for the proposition that where the disposition for the benefit of the poor was to be operative after the extinction of all the heirs of the wakif's daughter, the disposition is too remote and in, therefore, not moved by section 4 of the Mussalman Wakf Validating Act, 1913.

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1. (1935) 68 M. L. J. 107 : 40 L. W. 806 : I. L. R. 28 Mad. 204 : A. I. R, 1935 Mad. 29.
2. A. I. R. 1940 Cal. 501.
3. (1960) 1 M. L. J. 150 : I. L. R. (1960) Mad. 487 73 L. W. 85 : A. I. R. 1960 Mad. 318.
4. (1974) 87 L. W. 266 : A. I. R. 1974 Mad. 309.

Having regard to the above, the judgments of the Courts below, though concurrent, require to be set aside.

7. Mr. T. R. Rajagopalan, the learned counsel for the respondents, urges first and foremost that the deed or wakf Exhibit A-1 should be read as a whole. As far as the first schedule is concerned, apart from the moulet for which at least a minimum of Rs. 25/. has to be spent per year, there is also the requirement to perform fateha at the time of the death anniversary of the found. "Fateha", as had been understood in *Ramanathan Chettiar* v. *Vada Levvai Marak kayar*[1], would mean distribution of alms to the poor during the celebrations. Therefore, even though such a fateha has to be done after the death of the founder, having regard to the dominant intention and further having regard to the styling of the deed itself, clearly this is a deed of the wakf. In fact, in *Abdul Sattar Ismail* v. *Abdul Hamid Sait*[2], this Court has taken the view after referring to *Kunhamutty* v. *Ahmad Muballah*[3], that the recital of Koran is also a valid object of a wakf. The decision in *V. M. Mohin* v. *Wakf Board,Madras*[4], is a clear authority on point. That was also a case of wakf-alal-aulad, and there was a prohibition against alienation. A similar term is found in Exhibit A-4. The deed is a styled as wakf. All this would clearly point out that it is only a wakf and not a deed of gift as is contended by the other side. In view of this, there cannot be any difficulty in upholding the judgments of the Courts below.

8. Having regard to the above contentions, It is necessary to analyse the terms of Exhibit A-1 in some detail.

(1) The first thing that would strike anyone is that it is styled as a deed of wakf settlement. Even thereafter, mentioning the purpose for which the document is written, it is again stated that it is a wakf settlement. It is true that the nomenclature by itself is not conclusive of the character of the deed. But I am only referring to it as one piece of evidence. Be that so.

1. (1911) I. L. R. 34 Mad. 12: 20 M L. J. 254.
2. (1944) 2 M, L. J. 92 : I. L. R. (1940) Mad. 276; A. I. R. 1944 Mad. 504.
3. 68 : M. L. J. 107 : A. I. R. 1935 Mad. 29.
4. (1967) 1 M. L. J. 65 : A.I. R. 1968 Mad. 243.

(2) Coming to the terms of the document, what is seen is, during hislifetime, the author of the wakf himself remained a Huqdar, and in the first schedule house, moulet has to performed. For that purpose a minimum sum of Rs. 25/- has to be spent.

(3) the author of this document himself clearly says that this property shall not be encumbered or alienated by any person. Likewise after his death, the daughter was required to be the Huqdar and she was to enjoy the property during her lifetime without erecting any encumbrance whatsoever and from out of the income, she has to perform moulet.

(4) Then comes another important requirement, *viz.*, that after the death of the author, Fateha has to be performed. There again, it is reiterated that as stipulated above, the property shall not be either alienated or encumbered in any manner. It is only the income that has to be spent for these purposes.

(5) Lastly, it is stated in the document that in the event of there being no heirs to the daughter or there being no male heirs in the succeeding generations, it will be open to the female heirs or the descendants to be the huqdars and perform the above, *viz.*, moulet as well as fateha. Therefore, by a reading of these clauses together and not in isolation, the only impression that could be gained is that the dominant idea of the deed was to create a wakf and not merely to make a provision for the heirs or the descendents as is sought to be contended by the appellant.

9. I will take up the question as to whether moulet would constitute a valid object of the wakf. In "Principles of Mahomedan Law" by Mulla (Seventeenth Edition) section 178 (page 173), in cataloguing the valid objects of the wakf, it is stated at page 174 (item 11),

> "residing the Koran in public places, and also at private houses".

However, what is relied on by Mr. Abdul Hadi, the learned counsel for the appellant, is a ruling of this Court in *Kunhamutty* v. *Ahmad Musaliar*[1], That case was a decision of a Division Bench of this Court consisting of

1. (1935) 68 M. L. J. 67: A. I. R. 1935 Mad. 29.

Beasley, C. J. and King, J. holding that the dedication of certain properties for the purpose of reciting Koran over the tomb of a private person would not constitute a valid wakf. The learned Judges further held that though the proviso to section 3 of the Mussalman Wakf Validating Act (VI of 1913), stated that the object must be considered as a religious, pious or charitable purpose of a permanent character, the words "or charitable" would not be a disjunctive clause, and ultimately, it is concluded at page 31:

> "In our view, it is quite clear that the dedication in question being merely for the purpose of reciting the Koran over a tomb of a private person did not create a valid wakf...."

Certainly, in so far as it supports the case of the appellant, he is entitled to rely upon the said decision. The one important feature which cannot be lost sight of is that it did not remain with mentioning only moulet. As I said above, there is also a further requirement to perform fateha. The reason why I say that this constitutes an important point is that the very ruling cited above, refers to *Kale Foula Sahib* v. *Nuseeruddin Sahib*[1], wherein fateha was also contemplated. That distinction is brought out at page 30 by the learned Judges. This apart, "Principles of Mohamedan Law" by Mulla (Seventeenth Edition), section 178 (page 174) itself refers to performance of annual fateha of the settlor and the members of his family as a valid object of the wakf. The direct case concerning this is *Ramanathan Chettiar* v. *Vada Levvai Marakayar*[2], which is also a ruling of a Division Bench. There it was held that the performance of fateha (distribution of alms to the poor accompanied with prayers for the welfare of the soul of the deceased persons), which so far as it involves the expenditure of any money, consists in feeding the poor, is a valid object of wakf. When the learned counsel for the respondents strongly relied on this ruling, an

1. (1895) I. L. R. 18 Mad. 201 : 5. M. L. J. 40.
2. (1911) I. L. R. 34 Mad. 12 : 20 M. L. 254.

attempt was made by the learned counsel for the appellant to contend that fateha does not invariably include the distribution of alms to the poor. This means I will have to ascertain the correct meaning of fateha. Wilson's Glossary of Judicial and Revenue Terms states as follows:-

> "*FATHIA*, corruptly, *FATTAHA*, *FATHEH* and *FATEEAH*, an opening, commencement. The first *SURA* or chapter of the Koran, which being read for the benefit of dying Mohammadens, the word has come, in India, to signify prayers offered up for defunct persons on different days after their death, Accompanied by Alms and Distribution of Food as Fatiha-chaharam, on the twentieth, etc. also oblations and offerings to saints, and a variety of prayers and ceremonies used at marriages and funerals, including one observed by women in commemoration of Fatima, the daughter of Mohammed. called the Fatiha Sahnak, from Sahnak, a dish, sweatmenta in small vessels being distributed to the female assistants." (Italics supplied):

Therefore, it is too late in the day to contend that Fateha is not accompanied by giving of alms to the poor. In fact, in one of the later decisions of this Court in *Abdul Sattar Ismail* v. *Abdul Hamid Sait*[1], the question arose whether the reading of Koran in public places and also at private houses would constitute a valid object of the wakf. The learned Judges held at page 100.

> "The fourth object is the reading of the Koren in public placed and also at private houses. Here the plaintiff relies on the judgment of Stanley, C. J., in *Mozher Hussain Khan* v. *Abdul Hadi Khan*[2], and the judgment of this Court in *Kunhankutty* v. *Ahmad Musallah*[3]. In the former case, Banerji, J. held that where a substantial portion of the income of the property was devoted to the wakf

1. (1944) 2 M. L. J. 92 at page 99 : I. L. R. (1945) Mad 276.
2. (1911) I. L. R. 33 All. 400.
3. (1934) 68 M. L. J. 107 : I. L. R. 58 Mad. 204 : A. I. R. 1935 Mad. 29.

expenses of burning lamps in a mosque and the salary of Hafiz and readers of the Koran the wakf was valid. Stanley, CJ. doubted the validity of such a foundation. In the second case this Court held that the dedication of property for the purpose of providing funds for the recitation of Koran over the tomb of a private person, although he be a descendant of the Prophet did not create a valid wakf. On the other hand, the defendants rely upon the provisions of the Wakf Validating Act and the following passage to be found in Ameer Ali's work on Mohammaden Law Vo. I, P. 273).

11. 'The words 'piety' and 'charity' have a much wider significance in Mussalman Law and religion than in any other system. Khair, Bier, Ishan, etc., include every purpose which is recognised as good or pious under the Mussalman religion and the Mussalman Law, and the test of what is 'good' or 'pious' or 'charitable' is the approval of the *ALMIGHTY*. Every 'good purpose' (Wajshul-Khair) which God approves, or by which approach (Kurbet) is attained to the Deity, is a fitting purpose for a valid and lawful wakf or dedication. A provision for one's self, for one's children for one's relatives, is as good and pious an act as dedication for the support of the General Body of the poor'.

12. This is not a case of the founder of wakf merely directing the Koran to be read over his tomb and therefore does not fall within *Kunhankutty* v. *Ahmad Musaliar*[1]. The reading of the Koran in Public and private places can only be regarded as religious and pious and it seems to us that it must also be regarded as charitable, for the reading is for the benefit of all Mussalmans. The fact that money may be expended on the reading of the Koran in private places as well as in public "places does not detract from the religious, pious and charitable character of the object."

13. Therefore, having regard to the above ruling, notwithstanding the observations made in *Kunhankutty* v. *Ahmad Musaliar*[1], I have not the slightest hesitation in holding that the twin objects mentioned in Exhibit A-1 would clearly constitute vaild objects of the wakf.

1. (1934) 68 M. L. J. 107: I. L. R. 58 Mad 204: A. I. R. 1935 Mad. 29.

14. I may now refer to *T. Mayil Ammal* v. *Pappa*[1]. That is a ruling of Subrahmanyam, J. in that case, the learned Judge states:

> "It is argued that, since the income other than the sum of Rs. 5 directed to be spent on the performance of fate on the Prophet's birthday and the feeding of the poor on that day, is directed to be given not to the wakif's descendants as such but to the wakif's descendants in their capacity as Mutavallis, the object of that part of the instrument cannot be said to be the maintenance and support of the descendants of the founder of the wakf. I am unable to agree. The wakif's daughter and descendants were constituted trustees in order to prevent them effectively from alienating the properties. The document expressly states that subject to the obligation to spend Rs. 5 on the performances of the charity and to pay the kist, they might utilise the income for their own benefit without any power of alienation.
>
> They are described as trustees in order to make it clear that they have no power of alienation over the properties and are subject to the obligation of performing the charities described in the instrument. Otherwise, the purpose of the beneficial interest conferred on them is not to remunerate them for the services they render as trustees, but to provide for their maintenances and support because they are the descendants of the wakif. I find that the main purpose of the instrument was to provide for the maintenance and support of the plaintiff and her descendants and that it was a concurrent purpose that Rs. 5 a year should be spent on the charity specified in the instrument, namely, the performance of the fatis and the feeding of Fakirs on the Prophet's birthday."

15. On this, it is argued that there the amount to be spent was only a sum of Rs. 5 for the performance of fateha, and in the instant

1. (1960) 1 M. L. J. 150: A. I. R. 1960 Mad. 318.

case, it is equally a negligible sum and, therefore, the wakf is illusory. I am totally unable to accept this contention, because for moulet what has been ordained is an expenditure of a minimum of Rs. 25 per year. As regards fateha, no particular stipulation has been made. It would depend upon the largeness of the heart of the Huqdar. Therefore, this ruling is out helpful, and consequtly, I am not in a position to hold that the wakf is illusory. Once this position is arrived at. I do not think it is necessary for me to go into the larger aspect of the matter whether section 3 of the Mussalman Wakf Validating Act would protect this wakf or not. Undoubtedly, these are valid objects of the wakf as recognised by the Mahomadan Law, concerning which I have already referred to the leading authorities.

16. In this view, I do not think it is necessary for us to refer to either *Mohiddin Ahmed* v. *Sofia Khatun*[1], *or Sakunthala* v. *Basheedunnissa*[2].

17. The next decision that can be usefully referred to is that of Venkataraman, J., in *M/s. V. M. Mohin* v. *Wakf Board, Madras*[3]. In that case, the learned Judge was dealing with more or less a similar situation. The head note of that decision runs as follows :

> "The deed of wakf executed hy a Muslim woman provided that she will be entitled to enjoy the income of certain properties and after her lifetime, son of her brother was to receive and enjoy the income, and was to perform in accordance with the family custom, a barisia and fathis of her father, and was also to feed a traveller every day, after his lifetime his descendants were to enjoy the income and conduct the above charities; in the absence of his issues his elder sister or her decendants were to enjoy the income and do the charities ; the persons mentioned and their descendants were not entitled to alienate the properties :

18. It was held, that the deed was a valid wakf-alal-aulad. It was not correct to say that there was no transfer of ownership to God, and that only a charge was created for the charities. The deed was styled as a wakf deed and the term 'wakf' implied a transfer of ownership to God. There was no transfer of ownership to the brother's son of the wakf but he was only to enjoy the income subject to the performance of the charities. Further, the prohibition against alienation was consistent with wakf and was inconsistent with a transfer of ownership to the brother's son. The performance of the annual berssia and fathis for the father and the feeding of a traveller were valid objects of wakf".

19. The analysis of the deed of wakf in this case conforms to each and every test propounded by the learned Judge in that case and, therefore, this is an added reason for holding that Exhibit A-1 is only a deed of wakf, and it is not a deed of gift. I am unable to see any justification for interfering with the concurrent findings of the Courts below.

20. Hence, the second appeal fails and is hereby dismissed. There will be no order as to costs.

R. S. —— *Appeal dismissed.*

1. A. I. R. 1940 Cal. 501.
2. (1974) 87 L. W. 266 : A. I. R. 1975 Mad. 309.
3. (1967) 1 M. L. J. 65 : A. I. R. 1968 Mad. 243

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

T. K. Sundaram ... *Petitioner**

v.

V. Balraj ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 18—Tamil Nadu Buildings (Lease and Rent Control) Rules (1974), *rule 16 (3), Code of Civil Procedure (V of 1908), sections 151, 144—Scope of the third proviso to rule 16 (3)—Controller's order for eviction of tenant—Appeal to appellate authority—Dismissal of appeal for default—No stay during pendency of appeal—Application to set aside order of dismissal—Notice served on landlord—Execution of eviction order—Landlord obtaining possession—Respondent applying for redelivery—Redelivery ordered—Revision to High Court—Controller has all powers of a Civil Court—Includes inherent power to order restitution in appropriate cases.*

Sub-rule (3) of rule 16 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, deals with the process to set aside an *ex parte* order passed against a tenant or landlord or an order of dismissal for default. The third proviso to the Rule contemplates that all execution proceedings pursuant to the order of dismissal for default being stayed until the disposal of the application for setting aside the said order. [*Para.* 2.]

By virtue of section 18 of the Tamil Nadu Act XVIII of 1960 though the process of execution is laid and prosecuted before the Controller, yet he executes the orders referred to therein as if they are orders passed by a Civil Court and he has all the powers of a Civil Court. The contingency for restitution may not strictly arise as contemplated under section, 144 of the Code of Civil Procedure. The Controller is equated to a Civil Court for the purpose of exercising all the powers of a Civil Court. As such, the Controller is clothed with an inherent power to order restitution in appropriate cases, though the matter may not strictly come within the ambit of section 144 of the Code. [*Paras.* 9, 3.]

Cases referred to:—

Md. Sukri Sahib v. *Madhava Kurup*, (1949) 1 M. L. J. 376 : A. I. R. 1949 Mad. 809 ; *Md. Hussain* v *Pitchai*, (1970) 2 M. L. J. 663; *Thangaswamy Chettiar* v. *Bapoo Sahib*, (1949) 2 M. L. J. 699 : 62 L. W. 876 ; *Narayanaswami* v. *Renuka Devi*, (1960) 2 M. L. J. 318: I. L. R. (1960) 2 Mad. 512 : 73 L. W. 128 : A. I. R. 1960 Mad. 298 ; *B. V. Patankar* v. *C. G. Sastry*, (1961) 1 S. C. J. 221 : (1961) 1 S. C. R. 591 : A. I. R. 1961 S. C. 272.

Petition under Article 227 of the Constitution of India praying the High Court to revise the order of the Court of Small Causes, Madras, (XI Judge) dated 22nd December, 1981 and made in M. P. No. 779 of 1981 in R. P. No. 1219 of 1981 in H. R. C. No 1909 of 1980.

Inamdar Abdul Salam, for Petitioner.

A. C. Munuswami Reddy, for Respondent.

The Court made the following

ORDER.—The 'landlord' within the meaning of Tamil Nadu Buildings (lease and Rent Control) Act XVIII of 1960 hereinafter referred to as the Act, is the petitioner in this revision filed under Article 227 of the Constitution of India. The respondent herein is the 'tenant' within the meaning of the Act. The petitioner sought eviction of the respondent under the provisions of the Act in H. R. C. No. 1909 of 1980 on the file of the Eleventh Judge, Court of Small Causes, Madras, hereinafter referred to as the Controller. Eviction was ordered on 10th November, 1980 The respondent preferred H. R. A. No. 222 of 1981 to the concerned appellate authority and the said appeal was dismissed for default on 28th September, 1981. While the appeal was pending, there was no order of stay in M. P. No. 107 of 1981. The respondent preferred M. P. No. 631 of 1981 to set aside the order of dismissal for default on 16th October, 1981. The provision quoted in the application was rule 23 of the Tamil Nadu Buildings (Lease and Rent Control) Rules. Obviously, this is a mistake for

*C. R. P. No. 43 of 1982. *30th June*, 1982.

rule 16 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974, hereinafter referred to as the Rules. The appellate authority ordered notice to the petitioner herein on 6th November, 1981. It is admitted that notice was served on the counsel for the petitioner on 21st November, 1981. Yet, the petitioner sought execution of the order of eviction in H. R. C. No. 1909 of 1980 by filing E. P. No. 1219 of 1981 before the Controller and obtained an order of delivery on 21st November, 1981. The petitioner was obliged to seek an order for breaking open and police protection, obviously since he could not obtain possession by peaceful process. On 27th November, 1981, the Controller directed delivery of possession by breaking open the premises with police aid and on 28th November, 1981. possession was taken by the petitioner. On 31st November, 1981, the respondent filed M. P. No. 779 of 1981 before the Controller for redelivery, quoting the provisions of sections 144 and 151 of the Code of Civil Procedure, hereinafter referred to as the Code. The Controller directed redelivery on 22nd December, 1981, and this revision is directed against the order of the Controller.

2. Mr. Inamdar Abdul Salam, learned counsel for the petitioner would put forth two contentions coveting interference by this Court with the orders passed by the Controller. One is that the Controller misconstrued rule 16 of the Rules when he proceeded on the basis that by the filing of the application.....M. P. No 631 of 1981, the execution proceedings in H. R. C. No. 1909 of 1980 must be deemed to have been stayed. Rule 16 of the Rules delineates the procedure for the disposal of appeals by the appellate authority under section 23 of the Act. For the purpose of this revision we are only concerned with the implications of the third proviso to sub-rule (3) of rule 16 of the Rules. Sub-rule (3) deals with the process to set side on *ex parte* order passed against a 'tenant' or a 'landlord' or an order of dismissal for default. The third proviso to the said sub-rule reads as follows:

> "Provided also that where an application for setting aside an *ex parte* order or the order of dismissal for default has been received under this sub-rule for the first time, all execution proceedings, in pursuance of the *ex parte* order or the order of dismissal for default shall be stayed until the disposal of the application".

There is no dispute that the application, M. P. No. 631 of 1981, filed for setting aside the order of dismissal for default was one preferred for the first time. A bare reading of the proviso leaves no room for doubt that where such an application has been received by the appellate authority under sub-rule (3), all execution proceedings in pursuance of the order of dismissal for default shall be stayed until the disposal of the application. What the learned counsel for the petitioner states is that the proeedings in execution in H. R. C. No. 1909 of 1981 cannot be stated to be execution proceedings in pursuance of the order of dismissal for default, so as to attract this proviso. According to the learned counsel, only the proceeding in execution of the very orders passed by the appellate authority must be deemed to be stayed by virtue of the proviso, and not execution of the order passed in the parent proceedings. This is an obvious misconception. The expressions used in the proviso clearly refer to all execution proceedings in pursuance of the *ex parte* order or the order of dismissal for default. In the case of an appeal preferred by a landlord against the dismissal of his application for eviction by the Controller, there is a possibility that the tenant remains *ex parte*, and the appellate authority reverses the order of the Controller and passes an *ex-parte* order in appeal for eviction of the tenant. In such a case, there will be execution proceedings in pursuance of the *ex-parte* order passed by the appellate authority. In a case where an appeal has been preferred by the tenant against an order of eviction passed by the Controller, there is a possibility that the landlord remains *ex parte* and the tenant may succeed in having the appeal allowed in his favour setting aside the order of eviction passed against him by the Controller. Such an order passed *ex parte* against the landlord by the appellate authority could not be the subject-matter of execution proceedings, except for costs awarded or for restitution, in case possession has been taken already by the landlord, at the instance of the tenant. If the appeal

preferred by the tenant against an order of eviction passed against him by the Controller is dismissed for default, the parent order of eviction, which would have been stayed. gets revived and execution proceedings thereof could be prosecuted and this becomes possible only pursuant to the order of dismissal for default of the appeal by the tenant. Hence the proviso contemplates all execution proceedings pursuant to the order of dismissal for default being stayed until the disposal of the application for setting aside the said order. In the case of an appeal preferred by the landlord against the dismissal of his application for eviction, the said appeal also may be dismissed for default and in such a contingency. there may not be a chance for prosecuting the execution prosecdings, except for costs awarded against the landlord. Hence, I am not able to appreciate and accept the first submission of the learned counsel for the petitioner. If the correct legal position, as explained above, is applied, then it has to be held that the execution in E. P. No. 1219 of 1981 was prosecuted only pursuant to the order of dismissal of the appeal by the appellate authority and the delivery obtained by the petitioner could not be sustained in law, since there was a stay by virtue of the proviso referred to above.

3. Secondly, learned counsel would contend that the Controller had no competency to order restitution as he did. This submission omits to take note of the well-accepted legal propositions in this regard. The Controller was admittedly exercising the powers of a civil Court when dealing with execution of the order of eviction. Section 18 of the Act states that the orders enumerated therein shall be executed by the Controller under the Act as if such an order is an order of a civil Court and for this purpose, the Controller shall have all the powers of a civil Court. Though there may be some difficulty with reference to the invocation of the aid of section 144' of the code, yet, the Controller having been vested with all the trappings and powers of a civil Court definitely could order restitution under section 151 of the Code, if not under section 144. Section 144 by itself does not confer any new right which a party litigant otherwise possesses under the general law. The civil Court is clothed with an inherent jurisdiction to order restitution in appropriate cases where the ends of justice do demand the same. Such a power *is available* to the civil Court even though the application for the exercise of that power may not come within the ambit of section 144 of the Code. There was stay pursuant to the proviso referred to above. In spite of it, and practically in breach of it, execution was prosecuted and delivery of possession was obtained. To decline restitution in such a contingency would be practically nullifying the benefits of stay conferred by the said proviso. There is plethora of decisions countenancing the inherent power of civil Court to grant restitution, apart from section 144 of the Code. I do not feel obliged to refer to all of them, except those which have a bearing on rent control statutes.

4. In *Md. Sukri Sahib* v. *Madhava Kurup*[1], a Division Bench of this Court consisting of Horwill and Rajagopalan, JJ. held that posession got by a decree-holder in execution without the executing Court being aware of the inhibitions found in the provisions of the Madras Non-residential Buildings Rent Control Order (1942), as amended on 11th August, 1944, can definitely be restored by the executing Court under section 151 of the Code.

5. In *Thangaswamy Chettiar* v. *BapooSahib*[2], Horwill and Balakrishna Ayyar, JJ., held that it is a basic rule that Courts will not permit a suit or to suffer by reason of a wrong order it has made and that when once the error is discovered, it will, as far as possible, put him in the position which he would have occupied if the wrong order had not been made, and the right to restitution is not derived from section 144, Civil Procedure Code, and that section only prescribes the method of enforcing the right. The case dealt with by the learned Judges arose under Madras Act XV of 1946,

1. (1949) 1 M. L. J. 376 ; A. I. R. 1949 Mad. 809.
2. (1949) 2 M. L. J. 699 ; 62 L. W. 876.

the relevant provision of which as not as patently worded as section 18 of the Act. There the landlord got an order of eviction and actually got possession in execution, and on appeal, the order of eviction was reversed and the tenant applied for restitution and re-delivery, which were ordered and effected. The jurisdiction of the civil Court to order restitution was questioned. The learned Judges, treated the application for restitution as an application for execution itself.

6. In *Narayanaswamy* v. *Renuka Devi*[1], Balakrishna Ayyar and Subrahmanyam, JJ. countenanced the proposition that if execution of the order passed under the rent control statutes is before a civil Court, the provisions of the Code relating to execution could apply to such proceedings, except to the extent to which such procedure is modified by any express provisions of the rent control statutes.

7. In *B. V. Patankar* v. *C. G. Sastry*[2] the Supreme Court has countenanced the proposition that if the executing Court ignores the inhibtions of the provisions of the rent control statutes and passes an order of delivery of possession in execution, the order can be set aside and an order of re-delivery to the tenant can be passed on an application under section 47 read with section 151 of the Code.

8. In *Md. Hussain* v. *Pitchaia*[3], Ramanujam J. practically summarised the available case law on the subject and held that while executing the orders passed under the Act, the civil Court could order restitution invoking its inherent powers under seciion 151 of the Code.

9. By virtue of section 18 of the Act though the process of execution is laid and prosecuted before the Controller, yet he executes the orders referred to therein as if they are orders passed by a civil Court and he has all the powers of a civil Court. The contingency for restitution may not strictly arise as contemplated under section 144 of the Code. The Controller is equated to a civil Court for the purpose of exercising all the powers of a civil Court. As such, the Controller is clothed with an inherent power to order restitution in appropriate cases, though the matter may not strictly come within the ambit of section 144 of the Code.

10. The proposition of law being well-settled, and also delienated in the pronouncements referred to above, I have to hold that the Controller did not commit any error of jurisdiction or error of law when ordering redelivery, which order is being impugned in the present revision. This obliges me to dismiss the revision and accordingly, the same is dismissed.

11. There will be no order as to costs.

S. J. —— *Revision dismissed.*

1. (1960) 2 M. L. J. 318: I. L. R. 1960 Mad. 512: 73 L. W. 128: A. I. R. 1960 Mad. 298.
2. (1961) 1 S. C. J. 221: (1961) 1 S. C. R. 591: A. I. R. 1961 S. C. 272.
3. (1970) 2 M. L. J. 663.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Ratnavel Pandian, J.*

S. A. Ahamed ... *Petitioner**

v.

Alagar and others ... *Respondents*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (b)—*Petition for eviction—Demolition and reconstruction—Proposed demolition of two partition walls and putting up of two steel beams, not 'demolition and reconstruction' within the meaning of section 14 (1)* (b).

The mere demolition of two walls which are in the nature of partition walls and the putting up of two steel beams will not materially change the structure of the building or give it an entirely new face though the cubical content of the space enclosed is increased; and thus it will not amount to 'demolition and reconstruction'

*C. R. P. Nos. 1238, 1239 and 1240 of 1981.
29th July, 1982.

within the meaning of section 14 (1) (*b*) of the Tamil Nadu Act XVIII of 1960.

[*Paras*. 11, 7.]

Cases referred to:—

Pattabiraman v. *Accommodation Controller*, (1971) 2 M. L. J. 326 : 84 L. W. 779 : (1972) R. C J. 270 : A. I. R. 1972 Mad. 102 ; *K. Krishnan* v. *Munuswamy*, (1978) 2 M. L. J. 510 : I L. R. (1978) 3 Mad. 193 : (1978) 2 R. C. J. 520 : 91 L. W. 454 : A. I. R. 1979 Mad. 50; *Metalware and Company* v. *Bansilal*, (1979) 2 S. C J. 377 : (1980) 1 M. L. J. (S. C.) 1 : (1979) 3 S. C. C. 398 : (1979) 2 R. C. J. 452 : A. I. R. 1979 S. C. 1559 ; *Kanakavel* v. *Drugs and Chemicals*, (1980) 2 M. L. J. 392; *T. Thirupathi* v. *Maimoon Bibi*, (1981) T. L. N. J. 510.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act (XXIII of 1973) praying the High Court to revise the orders of the Court of the Subordinate Judge (Prl.) (Appellant Authority), Dindigul, dated 6th October, 1980 and passed in (1) C. M. A. No. 138 of 1979, (2) C. M. A. No. 140 of 1979 (3) C. M. A. No. 142 of 1977 respectively D. M. C. (*i*) R. C. O. P. No. 34 of 1977 Periyakulam) R. C. O. Nos. 34 of 1977 Rent Controller (District Munsif).

R. Krishnamurthi Advocate General for *Muthukumaraswami* for *Ramajagadeesan* and *Sethuraman*, for Petitioner.

M. V. Krishnan and *R. Nandakumar*, for Respondents.

The Court made the following

ORDER.—These three revision petitions are preferred by one S. A. Ahamed, the landlord in R. C. O. P. No. 35 of 1977 on the file of the Rent Controller (District Munsif), Periakulam. He filed a single petition seeking the eviction of all the respondents in these three revisions, under sections 10 (3) (*a*) (*iii*) and 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as the Act), on the grounds that the building is required for carrying on his business and that the same is *bona fide* required for demolition and reconstruction. The Rent Controller found both the grounds in favour of the landlord and ordered eviction. Aggrieved by the said order of the Rent Controller, the three tenants filed three independent appeals which were numbered as C. M. A. Nos. 138, 140 and 142 of 1979 before the appellate authority (Principal, Subordinate Judge, Dindigul, who rendered a common judgment allowing the appeals and setting aside the order of eviction passed by the Rent Controller for the reasons set out in the said judgment, holding that the building is required neither for immediate demolition and reconstruction nor for the purpose of carrying on the landlord's own business. Hence these revision petitions by the landlord.

2. Before adverting to the contentions raised by the learned Advocate-General on behalf of the revision petitioner in this batch of revisions, I would like to point out certain facts on the basis of which the order of eviction has been sought. The demised property is a single house situate in Periakulam Town abutting Kamaraj Road and facing south. The front portion of the building is divided into two parts with a passage in between. Adjoining these two parts, there is a hall on the northern side. The Commissioner in his plan Exhibit-2 has indicated the two parts in the front portion of the building as '*A*' and '*C*' and the back portion as '*B*'. The parts marked as '*A*' and '*C*' are given Door Nos. 70 and 70/2 and the portion '*B*' Door No. 70/1. '*A*' is in the occupation of the respondent in C. R. P. No. 1240 of 1981 who is having jewellery mart; '*C*' is in the occupation of the respondent in C. R. P. No. 1238 of 1981 who is running a barber's saloon and '*B*' is in the occupation of the respondent in C. R. P. 1239 of 1981, who is having a photo studio. The case of the revision-petitioner is that in August, 1977, he informed the respondents both in person and through his agent to vacate the premises as he wanted to demolish the building and reconstruct it for a purpose of his own *viz*., for carrying on his business under the name and style of 'Ravi Automobiles Spare Parts' On the promise given by the respondents to vacate the premises, the petitioner applied for and obtained from the Municipality the approved plan Exhibit A-1 and also the necessary permission under Exhibit A-2. But, subsequently the respondents refused to vacate the

building and therefore the landlord issued a notice under the original of Exhibit A-3 dated 22nd October, 1977, calling upon the respondents 2 and 3 to vacate, who sent two replies under Exhibits A-5 and A-6 respectively. Hence, he filed the abovesaid eviction petition.

3. As per the plan and permission, Exhibits A-1 and A-2, the petitioner-landlord is intending to remove the eastern wall of shop '*A*' and the western wall of the portion 'C' running north to south, in between which, the passage leading to the studio hall 'B' lies (as marked in the Commissioner's plan Exhibit C-2) and to put up two steel beams supporting the rafters, thereby making the parts A and C and the passage into a single big hall. The question that arises for consideration in these revision petitions is whether the proposed removal of the walls and the putting up of the two beams would amount to demolition and reconstruction or whether it would be only a structural alteration of the existing building. The learned Advocate-General, appearing on behalf of the revision petitioner in all the three cases, would contend that as the cubical content of the enclosed space is increased or altered consequent upon the removal of the two walls and the construction of the two beams, there is a substantial structural alteration changing the very identity of the building and giving a new look altogether and therefore it must be held that there is demolition and reconstruction of the building within the meaning of section 14 (1) (*b*) of the Act. In support of this contention, he would first rely upon the decision in *Pattabhiraman* v. *Accommodation Controller, Madras*-2(*1*)[1]. The relevant passage of the judgment therein reads thus:

> "As already stated the plan produced clearly makes out the situation that the first floor is sought to be interfered with materially and in many respects by the petitioner when he reconstructs the building in accordance with the sanctioned plan. The cubical content of enclosed space is increased or altered, the walls are changed and above all the roof of the premises is removed and substituted by another. In a case where the roof of a premises is removed and is substituted and this is followed by a variation of the space content of the quondam building, then undoubtedly the entire process involves not only demolition but also reconstruction."

In yet another portion of the same judgment, the learned Judge has observed thus :

> "I have already expressed the view that the work to be undertaken by the petitioner is effectively to change the entire face of the building, its cubical content and its size. More than anything else the roof is sought to be removed and substituted by another of a different variety altogether."

Then the learned Advocate-General drew my attention to the decision of a Division Bench of this Court in *K. Krishnan* v. *Munusamy*[1], in which the Division Bench referring to the judgment in *Pattabhiraman's Case*[2], has stated thus :

> "If we may say so with great respect, on the facts found by the learned Judge, the decision is unassailable".

Laying strong emphasis on the above observation of the Bench, it is submitted by the learned Advocate-General that the view expressed by Ramaprasada Rao, J., as he then was, in *Pattabhiraman's Case*[2] and *Krishnan's case*[1], is applicable to the facts of the present case where there cannot be any dispute that the removal of the two walls

1. (1971) 2 M. L. J. 327 : 84 L. W. 779 : 1972 R. C. J. 270 : A. I. R 1972 Mad. 102.

1. (1978) 2 M. L. J. 510 : I. L. R. (1978) 3 Mad. 193 : (1978) 2 R. C. J. 520: 91 L. W. 454 : A. I. R. 1979 Mad. 50.
2. (1971) 2 M. L. J. 326 : 84 L. W. 779 : 1972 R. C. J. 270 : A. I. R. 1972 Mad. 102.

and the putting up of the steel beams would be tantamount to demolition and reconstruction of the building within the meaning of section 14 (1) (*b*) of the Act.

4. Mr. M. V. Krishnan, appearing for the respondent in C. R. P. No. 1239 of 1981, would submit that the decision in *Pattabhiraman's case*[1], cannot be made applicable to the facts of the present case. According to him, in *Pattabhiraman's case*[1], the facts were entirely different, in that there was a sanctioned plan not only for the removal of the walls in the upstairs of the demised building therein but also for effecting a complete change of the roof from a tiled one into a Madras terrace, whereas in the present case the removal of the two walls forming the passage and the putting up of the steel beams will not in any way make any substantial structural alteration so as to change the identity and to give a new look altogether, even if the cubical content of the front portion is increased. The Divisional Bench of this Court in *Krishnan* v. *Munusamy*[2], while approving the decision of Ramaprasada Rao, J. (as he then was), in *Pattabhiraman's Case*[1], having regard to the facts therein, has stated as follows :

> "All that we wish to say on this aspect of the matter regarding the decision in *Pattabhiraman* v. *Accomodation Controller*[1], is that there appears to be somewhat an over-emphasis on the change of the roof by using the expression 'above all' in one place and 'more than anything else' in another place. But, as we said, we may repeat with respect that on the facts found by the learned Judge and by the authorities, there was demolition and construction of a new building, because the building let was only a particular floor where vast changes had to be made which completely destroyed the old structure on the first floor and brought into being an entirely new building. So section 14 (1) (*b*) was clearly applicable".

5. The Supreme Court in *Metalware and Company* v. *Bansilal*[1], while construing the term "*bona fide* required by the landlord for the immediate purpose of demolishing it", has observed thus:

> "As stated earlier it cannot be disputed that the phrase used in section 14 (1) (*b*) of the Act is 'the building is *bona fide* required by the landlord' for the immediate purpose of demolition and construction and the same clearly refers to the *bona fide* requirement of the landlord. It is also true that the requirement in terms is not that the building should need immediate demolition and reconstruction. But we fail to appreciate how the state or condition of the building and the extent to which it could stand without immediate demolition and reconstruction in future would be a totally irrelevant factor while determining 'the *bona fide* requirement of the landlord'. If the Rent Controller has to be satisfied about the *bona fide* requirement of the landlord which must mean genuineness of his claim in that behalf the Rent Controller will have to take into account all the surrounding circumstances including not merely the factors of the landlord being possessed of sufficient means or funds to undertake the project and steps taken by him in that regard but also the existing condition of the building, its age and situation and possibility or otherwise of its being put to a more profitable use after reconstruction. All these factors being relevant must enter the verdict of the Rent Controller on the question of the *bona fide* requirement of the landlord under section 14 (1) (*b*). In a sense, if the building happens to be decrepit or dilapidated it will readily make for the *bona fide* requirement of the landlord, though that by itself in the absence of any means being possessed by the landlord would not be sufficient. Conversely a landlord being possessed of sufficient means to undertake

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1. (1971) 2 M. L J. 326 : 84 L. W. 779 : 1972 R. C. J. 270.
2. I. L.R. (1978) 3 Mad. 193 : (1978) 2 R. C. J. 520 : 91 L. W. 454 : (1978) M. L. J. 510.

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1. (1979) 3 S. C. C. 398 : (1979) 2 R. C.J. 452 : (1980) 1 M. L. J. (S. C.) 1 : (1979) 2 S. C. J. 377: A. I. R. 1979 S. C. 1559.

the project of demolition and reconstruction by itself may not be sufficient to establish his *bona fide* requirement if the building happens to be a very recent construction in a perfectly sound condition and its situation may prevent its being put to a more profitable use after reconstruction. In any case these latter factors may cast a serious doubt on the landlord's *bona fide* requirement. It is, therefore, clear to us that the age and condition of the building would certainly be a relevant factor which will have to be taken into account while pronouncing upon the *bona fide* requirement of the landlord under section 14 (1) (*b*) of the Act and the same cannot be ignored".

In the same judgment, it is further observed as follows:

"We do not agree that old age and dilapidated condition of the building is a *sine qua non* or a decisive factor for eviction under section 14 (1) (*b*) nor is it possible to accept the view that the said circumstance is totally irrelevant in pronouncing upon the *bona fide* requirement of the landlord. We are clearly of the view that the age and existing condition of the building whether it is a recent construction or very old and whether it is in a good and sound condition or has become decrepit or dilapidated are relevant factors forming part of 'all the circumstances' that have to be considered while determining the *bona fide* requirement of the landlord under section 14 (1) (*b*) of the Act and in the totality of the circumstances these factors may assume lesser or greater significance depending upon whether in the scheme of the concerned enactment there is or there is not a provision for reinduction of the evicted tenant into the new construction. Such a view would be in accord with the main objective of the benign legislation enacted with the avowed intention of giving protection to the tenant".

Now, let me examine the facts of the present case and see whether all the requirements as contemplated under section 14 (1) (*b*) of the Act and as explained in the decisions cited above are fulfilled in this case.

6. Admittedly, the building was constructed in the year 1958. The petitioner has not let in any evidence to show that the condition of the building is not good and sound. Therefore, it has to be held that the building is not an old construction, nor is it in a dilapidated condition but on the other hand is in a good and sound condition. The three shops are let out to the respondents. Now, the petitioner is laying a claim that he requires the said building for his own use by altering and changing its dimensions and increasing the cubical content of the space. Before examining the petitioner's *bona fide* requirement of the building for his own use, let me examine whether the removal or destruction of the two walls forming the passage and the putting up of the two steel beams would be tantamount to demolition and reconstruction within the meaning of section 14 (1) (*b*) of the Act.

7. As already pointed out, the facts in *Pattabhiraman's case*[2], were entirely different from the facts of the present case. In *Pattabhiraman's case*[2], the first floor of the demised building therein was sought to be interfered with materially and in many respects by the landlord as per the sanctioned plan, such as putting up a staircase etc, and the cubical content of the enclosed space was increased or altered, the walls were changed and above all the roof of the premises was removed and substituted by another. Thus, as there was a complete variation of the space content of the quondam building on account of the effective change given to the entire face of the building, it was held, having regard to the facts of that case, that the said removal of the walls, the change of the roof etc., amounted to demolition and reconstruction. But in the present case the mere removal or destruction of the two walls inside the building, which are in the nature of partition walls, and the putting up of two steel beams for support of the rafters, in my view, would not materially alter the structure of the building, giving a new face to it,

2. 1972 R. C. J. 270 : (1971) 2 M. L. J. 326 : 84 L. W. 779.

though the removal of these two walls may increase the cubical content of the space enclosed by the shops '*A*' and '*C*' and the space in between, as indicated in the plan Exhibit C-2.

8. Ratnam, J., in *Kanakavel* v. *Drugs and Chemicals, Kumbakonam*[1], has held that the conversion of the existing thatched and tiled roofs of the front and rear portions of the building into R. C. roofing, while leaving untouched middle portion of the building, would not amount to demolition and reconstruction.

9. Sengottuvelan, J., in *T. Thirupathi* v. *Maimoon Bibi and others*[2], agreeing with the view taken by Ratnam, J., in *Kanakavel Pillai* v. *Drugs and Chemicals*[3], has held that the renewal of an existing roof of the front portion of a building and conversion thereof into reinforced concrete, the alteration of the tiled verandahs and the shifting of the latrine, would not amount to demolition and reconstruction.

10. The meaning of the word 'demolition' is defined in the Corpus Juris Secundum, Vol. 26-A, at page 178, as follows :

> "The word has been held synonymous with destruction. It has been distinguished from removal."

I think it is not necessary for me to refer to all the dictionary meanings for the word 'demolition' since the Division Bench in *Krishnan* v. *Munusamy*[3], has elaborately discussed the meaning of the word 'demolish' as given in a number of dictionaries.

11. The landlord examining himself as P. W. 1 had admitted in his evidence as follows :

> "கட்டிடத்தை இடித்து புது கட்டிடம் கட்டுகிறார் போல் இல்லை. ஆனால் demolition and reconstruction and for own use என்றுதான் போட்டு இருக்கிறேன்.

The above admission clearly shows that even though he filed the petition on the ground of demolition and reconstruction and for his own use, he had no intention of constructing a new building after demolishing the same. It will not be out of place to mention here that the Advocate-Commissioner in his report Exhibit C-1 has stated that the entire building was constructed in the year 1951 and there was no crack in the said building. Hence, I hold that the building does not warrant demolition. Further, from the discussions made above, I hold that the mere demolition of the two walls which are in the nature of partition walls and the putting up of the two steel beams will not materially change the structure of the building or give it an entirely new face though the cubical content of the space enclosed is increased, and thus it will not amount to 'demolition and reconstruction' within the meaning of section 14 (1) (*b*) of the Act.

12. Then the next question is whether the landlord *bona fide* requires the building for carrying on his own business. The petition for eviction was filed before the Rent Controller on 4th December, 1977. Earlier to the filing of this petition, the landlord had sent a notice under Exhibit A-3 dated 22nd October, 1977. If really the landlord had intended to start a business in Automobile Spare Parts, he would have definitely mentioned in Exhibit A-3 about his intention of carrying on his own business in the said building. But, there is absolutely no whisper of the landlord *bona fide* requiring the building for his own use in Exhibit A-3. Further, admittedly there is no evidence to show that the landlord had made any arrangements to carry on the business in Automobile Spare Parts in the building. Therefore, I hold that the case of the landlord that he *bona fide* requires the building for his own use is not acceptable.

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1. (1980) 2 M. L. J. 392.
2. (1981) T. L. N. J. 510.
3. I. L. R. (1978) 3 Mad. 193 : (1978) 2 R. C. J. 520 : (1978) 2 M. L. J. 510 : 91 L. W. 454.

13. For all the reasons stated above, I do not see any merit in the revision and consequently all these revisions are dismissed. No costs.

S. J. —— *Revisions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

E. V. Emperumal ... *Petitioner**

v.

M/s. Raja Kalyana Mandapam, represented by its Managing partner D. Kumaravel ... *Respondent.*

Presidency Small Causes Court Act (XV of 1882), section 38 and Civil Procedure Code (V of 1908), section 115—Revision against order in New Trial Application—Powers of the High Court to entertain such revision.

In the Presidency Small Causes Court Act, there is no provision for appeal or revision against the order pronounced by a Bench of that Court exercising its powers under section 38 of the Act by the aggrieved party. The nature of New Trial Application itself is not in the nature of appeal but is only a revision. When a Bench of the Court of Small Causes itself is entertaining an application against the judgment of one of its Courts and exercising only its jurisdiction, which is more or less of the nature of revisional power, it is needless to say that further proceedings that can be entertained by the High Court under section 115, Civil Procedure Code, can only be on a question of any error or infirmity that is contemplated by the said section of the procedural law of the land. Under section 38 of the Presidency Small Causes Court Act (XV of 1882), no appeal power is conferred on the Bench of the said Court entertaining applications under the said provision and, as such, a person against whom an order is passed by the said Bench and is also aggrieved in pursuance thereof, may apply, to the High Court for revision under section 115, Civil Procedure Code. When a person is aggrieved so far as the Presidency Small Causes Court Act is concerned, the highest forum of the State which he has to approach is through the provisions of the procedural law of the land, namely section 115 of the Code of Civil Procedure, and one who is aggrieved by an order of the Court which is described as Provincial Small Causes Court as per the provision of Act IX of 1887 has to get redressal of his grievance under the provisions of section 25 of Act IX of 1887. [*Paras. 3 and 4.*]

In this case a perusal of the revisional order in N. T. A. No. 4 of 1981 would disclose that all the formalities had been upheld as a Court exercising jurisdiction under section 38 of the Presidency Small Causes Court Act (XV of 1882) by the lower Court and there is no infirmity that could be found as contemplated under the provisions of section 115, Civil Procedure Code. [*Para.* 6.]

Cases referred to:—

Madras Cine Service v. *Shyamala Pictures (P.) Ltd.*, (1968) 2 M. L. J. 205 : 81 L. W. 174 ; *Sadasook Gambir Chund* v. *Kannayya*, (1896) I. L. R. 19 Mad. 96 ; *Srinivasa Charlu* v. *Balaji Rauk*, (1898) I. L. R. 21 Mad. 232 ; *Hari Shankar* v. *Rao Girdhari Lal Chowdary*, A. I. R. 1963 S. C. 698 ; *G. M. Nagoor Meeran Sahib* v. *Sookula Sowcar*, (1915) 2 L. W. 719 : 30 I. C. 488.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Full Bench or the Court of Small Causes, Madras, dated 28th August, 1981 and passed in N. T. A. No. 4 of 1981 (Suit No. 122 of 1980, III Judge, Court of Small Causes, Madras).

N. Balaraman, for Petitioner.

V. K. Kumaraswami, for Respondent.

The Court delivered the following

JUDGMENT.—This is a civil revision petition filed under section 115, Civil Proce-

* C. R. P. No. 4203 of 1981. *11th November*, 1982.

dure Code, against the order made by the Bench of the Court of Small Causes in N. T. A. No. 4 of 1981. The learned .III Judge and the IV Judge, Court of Small Causes constituted the Bench. The New Trial Application No. 4 of 1981 was filed against the Judgment and decree in Suit No. 122' of 1980 rendered by the learned III Judge, Court of Small Causes, Madras on 27th day of November, 1980 holding that the suit is not maintainable since section 69 (2) of the Partnership Act had not been satisfied and also holding that the accountant-defendant is not liable to pay the value of the alleged shortage of 69 tumblers and six cups. The said New Trial Application had been preferred under section 38 of the Presidency Small Causes Court Act (XV of 1882), wherein the Bench of the Small Causes Court allowed the application. It is against that order pronounced by the Bench in the New Trial Application, the defendant has come forward with this revision petition under section 115 of the Code of Civil Procedure.

2. The point for consideration in this civil revisision petition is whether there is any error of jurisdiction or any other error as contemplated under the provisions of section 115 of the Code of Civil Procedure, that has been committed by the lower Court in pronouncing the judgment in N. T. A. No. 4 of 1981.

3. Even before actually dealing with the merits of this civil revision petition, it is better to note the provisions under which the revision lies as against the order pronounced by the Bench of the Court of Small Causes in N. T. A. No. 4 of 1981. The new trial contested cases are actually entertained by the Presidency Small Causes Court under the provisions of section 38 of the Act XV of 1882. It reads as follows :

"*New trial of contested cases* :—Where a suit has been contested, the Small Causes Court may, on the application of either party, made within eighty days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code Civil Procedure) order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings.

Explanation :—Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant."

As against the order in the new trial application entertained by the Bench of the Court of Small Causes in the Presidency Town, a revision only is available to the aggrieved party. Section 39 of the Presidency Small Causes Court Act (XV of 1882) reads as fallows :

"*Removal of certain causes into High Court.*—(1) In any suit instituted in a Small Causes Court in which the amount or value of the subject-matter exceeds the sum of one thousand rupees, the defendant or any one of the defendants may, before the day fixed by the summons for the appearance of the defendant or within eight days after the service of the summons on him, whichever period shall last expire, apply *ex parte* on an affidavit setting forth the facts on which he relies for his defence to a Judge of the High Court for an order removing the cause into the High Court.

(2) Unless the Judge is of the opinion that the application has been made solely for the purpose of delay, the applicant shall be entitled to such order as of right:

Provided that the removel directed by such order shall, unless the Judge otherwise directs, be conditional upon the applicant giving security, to the approval of the Judge, within a reasonable time to be prescribed in the order for the payment of the amount claimed and of the costs which may become payable by him to the plaintiff in respect of the said suit.

(3) If the applicant fail or neglect to complete the required security (if any) within the prescribed time (if any), the said order shall be discharged and the suit shall proceed in the Small Causes Court as if such order had been made.

(4) If the plaintiff in any case which has been removed under this section into the

High Court has abandoned a portion of his claim in order to be able to bring the suit within the jurisdiction of a Small Cause Court, he shall be permitted to revive the portion of his claim so abandoned".

It is under the Civil Procedure Code, where there is a provision under section 115, Civil Procedure Code, that a revision petition can be filed if there is no specific provision available in any enactment conferring appeal remedy for the aggrieved party. In the Presidency Small Causes Court Act (XV of 1882), there is no provision for appeal or revision as against the order pronounced by the Bench of the Court of Small Causes, exercising its power under section 38 of the Act by the aggrieved party. Further the nature of the new trial application itself is not in the nature of the appeal, but it is only a revision. It has been so held in many decision of this Court as well as in *Madras Cine Service* v. *Shyamala Pictures (P) Ltd*[1]. Therefore, when a Bench of the Court of Small Causes itself if entertaining an appliction against the judgment of one of its Courts and exercising only its jurisdiction, which is more or less of the nature of revisional powers, it is needless to say that further proceedings that can be entertained by the High Court under section 115, Civil Procedure Code, can only be on a question of any error or infirmity that is contemplated by the said section of the procedural law of the land.

4. It is also relevant in this connection to note that under section 38 of the Presidency Small Causes Court Act (XV of 1882), no appeal power is conferred on the Bench of the said Court entertaining applieations under the said provision and as such a person against whom an order is passed by the said Bench and who is aggrieved in pursuance thereof, may apply to the High Court for revision under section 115, Civil Procedure Code. It has been so held by this Court as early as in *O. M. Nagoor Meeran Sahib* v. *Sookulal Sowcar*[2]. In the said decision, it has been clearly held that the High Court can exercise a revisional jurisdiction over the Presidency Small Causes Court. Thus we find that the jurisdiction under section 38 of the Presidency Small Causes Court Act is not of appeal nature and a person against whom an order is made is not bound to apply to the Full Bench of the Presidency Small Causes Court for new trial before invoking the revisional jurisdiction of the High Court. For arriving at the above decision this Court had followed the decisions raperted in *Sadasook Gambir Chund* v. *Kannayya*[1] and *Srinivasa Charlu* v. *Balaji Rau*[2]. Thus, it is seen that this civil revision petition before this Court under disposal, is one which is entertainable under section 115, Civil Procedure Code.

1. (1968) 81 L.W. 174: (1968) 2 M. L. J. 205.
2. (1915) 2 L. W. 719; 30 I. C. 488.

5. In this regard, it is also better to be enlighten ourselves with the analogous provisions available in the Provincial Small Causes Court Act (IX of 1887). It is under section 25 of the said enactment, the revision of the decree and orders of the Court of Small Causes are dealt with. It is provided under section 25 of the Provincial Small Causes Court Act (IX of 1887) that the High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes, was according to law, may call for the case and pass such order with respect thereto as it thinks fit. Thus it is only under section 25 of the Piovincial Small Causes Court Act (IX of 1887) that a revision lies as againt the order of the Court of Small Causes which Court's jurisdiction is dealt with under section 15 of the said enactment which reads as follows:

"*Cognizance of suits by Court of Small Causes:*— (1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the State Government may, by order in writing,

1. (1896) I.L. R. 19 Mad. 96.
2. (1898) I. L. R. 21 Mad. 232.

direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order".

Bearing in mind the above provisions of law of the two enectments it is seen that when a person is aggrieved in so far as the Presidency Small Causes Court Act is concerned, the highest forum of the State which he has to approach is through the provisions of the procedural law of the land, namely, section 115 of the Code of Civil Procedure, and the other who is aggrieved by an order of the Court which is described as Provincial Small Causes Court as per the provisions of Act IX of 1887 has to get his redressal of his grievance under the provisions of section 25 of the Act IX of 1887. This distinction has to be borne in mind in order to appreciate the points that may be arising under both the enactments, because so far as the Presidency Small Causes Court Act is concerned, the aggrieved party is heard in its revisional powers under section 38 by a Bench consisting of two Judges of the very same Court and thereafter once when the aggrieved party is allowed to come by way of revision to this Court under the said enactment whereas it is not so under section 25 of the provincial Small Causes Court Act (IX of 1887). As a matter of fact, the above principles have been laid down by the Supreme Court in *Hari Shankar* v. *Rao Girdhari Lal Chowdhury*[1]. The said decision has to be implicitly followed by this Court in its proceedings while dealing with the revision arising under section 25 of the Provincial Small Causes Court Act (IX of 1887).

6. Bearing the above principles in mind, when the impugned order is scrutinised, this Court finds that there is absolutely no merit in the revision petition. None of the contentions raised on behalf of the revision petitioner can be upheld. A perusal of the revisional order in N. T. A No. 4 of 1981 would disclose that all the formalities had been upheld as a Court exercising jurisdiction under section 38 of the Presidency Small Causes Court Act (XV of 1882) by the lower Court and there is no infirmity that could be found as contemplated under the provisions of section 115, Civil Procedure Code. There is no merit in the civil revision petition and hence it is liable to be dismissed and is accordingly dismissed, in the circumstances without costs. Three months' time is granted to the revision petitioner as prayed for payment from today.

R. S. —— *Petition dismissed.*

1. A.I.R. 1963 S.C. 698.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Swamikkannu, J.*

Pappayee Ammal ... *Petitioner**

v.

Subbulakshmi Ammal, Kamaraj Market, Karur and another ... *Respondents.*

Civil Procedure Code (V of 1908), Order 29, rule 9, Order 41, rule 27 and sections 107 (2), 94 and 151—Appeal pending—Report of Commissioner appointed in trial Court on record—Report not attacked—Appointment of fresh Commissioner for local inspection of suit property sought in the appeal—Not authorised under Order 41, rule 27, Civil Procedure Code (V of 1908).

The appointment of a Commissioner in appeal is a rarity and is seldom resorted to. Such an appointment is not authorised by Order 41, rule 27, Civil Procedure Code. The rule relates to additional evidence and the language of rule 27 (1) (*b*) does not lend itself to a construction that a warrant of Commission can be issued at the appellate stage. It is true section 107 (2) of the Code of Civil Procedure, gives the appellate Court the same powers and the same duties as nearly as may be as are conferred and

*C. R. P. No. 4516 of 1981. 2nd *December*, 1982.

imposed by the Code on Courts of original jurisdiction in respect of suits instituted in them. [*Paras.* 4, 5 *and* 6.]

In the instant case, the Commissioner's report is already in existence and it is for the very same reason and subject-matter another Commissioner is required to be appointed by respondent herein. In the absence of any personal allegation against the Commissioner or non-availability of proper representation before the Commissioner because of the failure to give notice by the Commissioner or other such features which may vitiate the very procedure that had been adopted by the Commissioner, certainly, the contention raised by the respondent herein cannot be upheld. Under the circumstances, the civil revision petition is liable to be allowed, and is accordingly allowed. [*Para.* 8]

Cases referred to:—

T. R. Rajagopala Iyer v. *T. R. Ramachandra Iyer*, (1968) 81 L. W. 347 : A. I. R. 1969 Mad. 144; *Arumugham* v. *Arumugham*, (1979) 1 M. L. J. 358.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Karur, dated 26th November, 1981, and made in I. A. No. 324 of 1981 in A. S. No. 132 of 1979,

K. Sarvabhauman, for Petitioner.

Sivasubramanian and *P. Pandi*, for Respondents.

The Court made the following

ORDER.—Mr. Sarvabhauman, the learned counsel for the revision petitioner, contends that it is rather strange that the appellate Court had appointed a Commissioner when there is already on record a report of the Commissioner which was not attacked by the aggrieved appellants before the lower Court, and in the circumstances, the order of the lower appellate Court is contrary to law. In this regard, he refers to the decisions reported in *T. R. Rajagopala Iyer* v. *T. R. Ramachandra Iyer*[1] and *Arumugham and 3 others* v. *Arumugham*[2].

2. In the instant case before me, the petition was filed by the appellants in A. S. No. 132 of 1979 under Order 29, rule 9 and sections 94 and 151 of the Code of Civil Procedure, praying for appointment of a Commissioner for local inspection of the suit property. In the affidavit accompanying the petition I. A. No. 324 of 1981, it is *inter alia* stated on oath by Selvaraj, the second appellant, that a commissioner was appointed in the trial Court and that he had filed his reports and plans. It is further stated in the affidavit that some features which were material were not actnally noted in the report and that the measurements also had to be checked up. In the counter filed by Pappayee Ammal, the plaintiff in the suit, it was *inter alia* contended that the alleged material physical features said to have been omitted to be brought to the notice of the Commissioner have not been disclosed in the petition, that the petition is devoid of any particulars and that it is only a vague attempt to delay the matters.

3. On these representations by either side in the petition, the lower appellate Court had made an order as follows:—

> "Of course in the petition the physical features which are said to have been omitted to be noted by the Commissioner are not set out in the affidavit filed in support of the petition. But that is not a ground for denying the relief asked for. The repondent does not have any other objections to this application. Moreover, the appointment of the Commissioner cannot cause any prejudice to the parties. Therefore in such circumstances I hold that it is just and necessary to appoint a Commissioner. Therefore, Thiru P. Murugesan, Advocate is appointed as Commissioner to make the local inspection ....."

It is the above order that is now questioned as one which had been made by the lower

1. (1968) 81 L. W. 374 : A. I. R. 1969 Mad. 144.
2. (1979) 1 M. L. J. 358.

appellate Court without properly appreciating the scope of Order 41, rule 27 (1) (*b*) of the Code of Civil Procedure.

4. The appointment of a Commissioner in appeal is a rarity and is seldom resorted to. Such an appointment is not authorised by Order 41, rule 27, Civil Procedure Code. In the instant application, the reference is to Order 26, rule 9 and sections 94 and 151, Civil Procedure Code, Order 26, rule 9, Civil Procedure Code, reads as follows:

> "In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :
>
> Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

It is relevant in this connection to note that the affidavit accompanying the petition for the appointment of a Commissioner once again by the appellate Court at the stage when the appeal is pending does not at all clearly set out the purpose for which the appointment of a Commissioner is required. If really the lower appellate Court felt that a fresh commission has to be issued, it could have done it while disposing of the appeal observing the various circumstances which led to the appointment of a Commissioner to once again to visit the suit locality. But without disposing of the appeal, when the lower appellate Court had resorted to appoint a Commissioner for the very same purpose for which an earlier commission warrant had been issued and a report is actually in the case records, this Court has no other alternative but to say that the said order is not in accordance with the provisions of Order 41, rule 27 of the Code of Civil Procedure.

5. In my view, such appointment is not authorised by rule 27 of Order 41. The rule relates to additional evidence and the language of rule 27 (1) (*b*) does not lend itself to a construction that a warrant of commission can be issued at the appellate stage. If really the appellants before the lower appellate Court were aggrieved during the trial stage itself, when the report was filed by the Commissioner, objections ought to have been submitted before the trial Court itself. The physical features which were not referred to at that stage, namely, at the trial stage, cannot be said to have come into existence at the time of appeal. That is not actually the case put forward in the affidavit that has been filed accompanying the petition for appointment of the Commissioner.

6. It is true that section 107 (2) of the Code of Civil Procedure gives the appellate Court the same powers and the same duties as nearly as may be as are conferred and imposed by the Code on Courts of Original Jurisdiction in respect of suits instituted in them.

7. Mr. Sivasubramaniam, learned counsel for the respondents herein submits that there is no prohibition available in the procedural law of the land which ties the hands of the appellate Court thereby denying the opportunity of appointing another Commissioner in an application to go into the question of the existence or otherwise of the physical features of the property in question. In the instant case, he submits, it is only by exercising the discretion vested with the lower appellate Court under section 151 of the Code of Civil Procedure, the lower appellate Court had passed an order and when such a discretion had been exercised judicially, the revisional Court cannot go into the said matter and say that the said discretion had been exercised arbitrarily or capriciously. This Court does realise that there is some force in the arguments advanced by Mr. Sivasubramaniam. It is relevant in this connection to note that no objection seems to have been raised at all during the stage of the trial for the Commissioner's report. What is more, the appeal itself had been pending and when the Commissioner's report had been accepted and a judgment had been rendered by the trial Court and that was the subjectmatter of the appeal, an application has been filed for the appointment of a Commissioner on a bald allegation that the physical features of the property in question had not been gone into, and that allegation had been stoutly denied in the counter that had been filed to the said

petition. When the lower appellate Court had passed an order during the stage of the pendency of the appeal before it and when it is common ground that there had been no objection filed before the trial Court for the report of the Commissioner who was appointed for the very same purpose for which an order enabling a new Commissioner had been passed by the lower appellate Court, this Court is certainly of the opinion that the remedy that had been granted by the lower appellate Court by way of an order is one which is certainly not in the interests of justice, nor is one which may be recognised by the procedural law of the land either under Order 41, rule 27, Civil Procedure Code, or under Order 26, rule 9, Civil Prdcedure Code read with section 107, Civil Procedure Code.

8. In the instant case, the Commissioner's report is already in existence and it is common ground that it is for the very same reason and subject-matter another Commissioner is required to be appointed by the respondent herein. In the absence of any personal allegation against the Commissioner or non-availability of proper representation before the Commissioner because of the failure to give notice by the Commissioner or other such features which may vitiate the very procedure that had been adopted by the Commissioner, certainly, the contention raised on behalf of the respondent herein cannot be upheld. Under the circumstances, the civil revision petition is liable to be allowed, and is accordingly allowed with costs. The lower appellate Court is directed to dispose of the appeal as early as possible as the appeal is of the year 1979.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Minor J. Srinivasan, by mother and guardian J. Shanthi, Proprietor, Sri Dhanalakshmi Service, Chidambaram ... *Petitioner**

v.

Kannan Motor Transport, 43, Kanagasabai Nagar, Chidambaram ... *Respondent.*

(A) *Motor Vehicles Act (IV of 1939), sections 2 (2), 2 (19), 4, 21 and 47—'Permit' and "owner", definitions of—Minor, whether can be a permit holder.*

(B) *Motor Vehicles Act (IV of 1939), section 47—Grant of stage carriage permit—Criteria for consideration.*

(C) *Hindu Minority and Guardianship Act (XXXII of 1956), section 2 —Father alive—Whether mother could act as guardian of owner.*

Section 2 (19) of the Motor Vehicles Act clearly postulates a minor being an owner of the vehicle. The definition of "permit" contained in section 2 (12) enables an owner of a vehicle to ply it; [*Para.* 4.]

The necessity for permit is underscored under section 42. That does not prescribe any age limit. Section 4 of the Motor Vehicles Act, in contra-distinction, talks of age limit for driving a motor vehicle prescribing 21 years. Likewise grant of a conductor's licence is dealt with under section 21 (*c*) (11).

[*Para.* 4.]

In considering the grant of the stage carriage permit, section 47 lays down the criteria for consideration and even by implication does not prohibit a minor being a permit holder. In fact, rule 156 prescribes the application for permit, statutorily, that in respect of stage carriage the form is S. C. P. A. By G. O. Ms. No. 2179 (Home), dated 29th November, 1975 Column (*c*) has been introduced. It says that if the applicant is a minor, full name and address of the guardian should be given. If under the legislative practice for holding a permit, no age limit is prescribed the Court cannot interpret it so as to bring in other considerations like legal necessity or benefit

*C. R. P. No. 2769 of 1979.

29th September, 1982.

to the minor. In all statutes wherever a minor was sought to be excluded from holding the licence, it has been specifically done so. [*Para.* 4.]

All these provisions to take within them a minor being an applicant and if therefore a minor could well be granted a permit it cannot be said that a minor has no capacity to contract under section 11 of the Contract Act and therefore he is competent to apply for a permit. [*Para.* 4.]

On a reading of the provisions of the Hindu Minority and Guardianship Act it is clear that during the lifetime of the father the mother cannot be the guardian because of the words "and after him" occurring in clause (*a*) of section 6. There is an added reason for holding so. Because this right of guardianship is a valuable right and the Hindu father who under section 9 of the Act, is entitled to act as natural guardian for a minor, may by will appoint a guardian is respect of a minor's person or property or in respect of both. An appointment made under sub-rule (1) of section 9 shall have no effect if the father predeceases the mother but shall revive if the mother dies without appointing by will, any person as guardian. To say that because there is no prohibition the mother could not act as guardian seems to be overstating the law without looking into the relevant provisions of section 6 of the Hindu Minority and Guardianship Act, which gives right to the mother only after the father. [*Para.* 5.]

Cases referred to:—

Viswanathan Pillai v. *Shanmugam*, (1966) 1 M. L. J. 363 : 79 L. W. 284 : I. L. R. (1966) 2 Mad. 477 : A. I. R. 1967 Mad. 100 ; *Jijabai* v *Pathankhan*, (1971) 2 S. C. J. 17 : (1971) 2 S. C R. 1 : A. I. R. 1971 S. C. 315 ; *Mercantile Union Guarantee Corporation Limited* v. *Ball*, (1937) 3 All E. R. 1 ; *B. B. Rao* v. *State*, (1970) 1 An. W. R. 196 : A. I. R. 1970 A. P. 395.

Petition under section 64-B of the Motor Vehicles Act read with section 195, Civil Procedure Code, praying the High Court to revise the Order of the State Transport Appellate Tribunal, Madras dated 4th September, 1979, and made in Appeal No. 507 of 1978 (R. No. 3873/A-1/78 dated 15th February, 1978, R. T. A., South Arcot), Cuddalore.

C. Ramaswamy for *M. N. Rangachari*, for Petitioner.

The Advocate-General for *R. Muthukumaraswamy* and *V. Rama Jagdeesan*, for Respondent.

The Court made the following

ORDER.—Two important questions arise for consideration in this civil revision petition. They are (1) whether a minor can be holder of a permit under the Motor Vehicles Act and (2) whether during the lifetime of the father, the mother can represent a minor The facts in this revision lie in a narrow compass. The revision petitioner applied for the grant of a stage carriage permit on the route Kurinjipadi to Ponnanthittu via, Adur Agaram, Bothavacheri, Bhuvanagiri, Chidambaram and Killai. The length of the route is 45.3 kilometres, which is in motor parlance called a minimum route. A proposal was published under section 57 (2) of the Motor Vehicles Act inviting applications. In response to this there were 5 applicants. The petitioner was applicant No. 1 while the respondent was applicant No. 5. The Regional Transport Authority at the hearing dated 15th February, 1978, granted the permit in favour of the petitioner who secured 10 marks since the respondent obtained only 8 marks. Aggrieved by this grant, the matter was taken up in appeal to the Appellate Tribunal. The Tribunal reversed the orders of the Regional Transport Authority mainly on two grounds, they being that the award of 8 marks in favour of the respondent was wrong and it should be increased to 10 marks. On this basis, it proceeded to compare the claims of the revision petitioner as well as the claims of the respondent. It was of the view that the revision petitioner did not have his residence at Chidambaram while it was not so in the case of the respondent. The transfer alleged against the respondent was quite legal and the same would not bar the grant of permit. Ultimately it concluded in the following words; "I find that the lower authority erred in granting the permit to the respondent who is only a minor prosecuting his studies in the college at Chidambaram with permanent residence at Tirukoilur and that the grant of the permit to him will not be in the interests of travelling public". It is to revise this

order, the present civil revision has been preferred.

2. Mr. G. Ramaswami, learned counsel for the petitioner draws my attention to the legislative practice under the Motor Vehicles Act by which the age limit is sought to be prescribed. For instance, section 21-C (1) of the Act which deals with the grant of conductor's licence has specified the age. While section 42 speaks of the operation of the transport vehicle on a public road, it has not prescribed any age limit. Permit is property is a settled proposition as seen from the decision in *Viswanathan Pillai* v. *Shanmugam*[1], and the term 'owner' occurring in section 2 (19) has been defined to include a minor as well. In the case of issue of a permit, no acceptance of the conditions is necessary for application for permit. According to it also, if the applicant is a minor; the guardian can very well represent him. In Paterson's Licensing Act, infancy *per se* has not been made a disqualification (page 782). Therefore, wherever the conditions stated under the permit are sought to be enforced it can be done only as against the permit and not against the person. In so far as, section 2 (19) includes a minor as well for the purpose of ownership, there cannot be any legal objection.

3. The learned Advocate-General in opposition states that section 11 of the Contract Act talks of the capacity of a minor to contract. Guardian steps in on behalf of the minor. The guardian can act only in two cases, either on the ground of legal necessity or for the benefit of the minor; in the case of trading contracts like this, it is impossible to represent because they have been held to be not beneficial to the minor [(1937.) 3 All England Reports Page 13.] For instance, contract to purchase a lorry on a hire purchase system was held to be not a necessity. Under section 47 (1) (*c*), the interest of the public will have to be taken note of. In any event it is submitted that in the instant case the father alone should have applied for the permit on behalf of the minor but not the mother so long as the father is alive. This is because of the unambiguous language occurring in section 11 of the Hindu Minority and Guardianship Act. Section 11 postulates that a *de facto* guardian like the mother cannot deal with property. Therefore, the application itself is incompetent and there is no need for this Court, to go into the merits. In reply to this last of the submissions about the competency to maintain the application of the minor represented by the mother and guardian Mr. M. N. Rangachari, appearing for the petitioner along with Mr. G. Ramaswami states that section 2 of the Hindu Minority and Guardianship Act is only complementary to the existing provisions. Section 4 (*c*) of the Hindu Minority and Guardianship Act defines the natural guardian including all the guardians under section 6 of the said Act. Section 13 speaks of the welfare of the minor. Therefore, having regard to these provisions in the light of the decision in *Jijabai* v. *Pathankhan*[1], it cannot be contended that the mother can never be the guardian at all. Section 4 (*c*) states that natural guardian means any of the guardians mentioned in section 6. Unless and until the mother is included, it will mean that section 4 (*c*) is redundant. Therefore, in the instant case, where there was a partition the minor was represented by the mother. Further even in respect of the sales effected in favour of the minor, the mother alone represented the minor. She has been looking after the affairs of the minor from 1975 onwards. Therefore it is impossible to say that the application is not maintainable.

4. On the first question, whether a minor can be a permit holder, I have to refer, firstly to the meaning of the term 'owner' occurring in section 2 *(19)* of the Motor Vehicles Act, which is as follows :

> "2 (19). "owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, the person in possession of the vehicle under that agreement ;"

That clearly postulates a minor being a owner of the vehicle. The definition of 'permit' is contained in section 2 (2) which is as follows :

1. (1966) 1 M. L. J. 363 : 79 L. W. 284 : I. L. R. (1966) 2 Mad. 477 : A. I. R. 1967 Mad. 100.

1. (1971) 2 S. C. J. 17 : (1971) 2 S. C. R. 1 ; A. I. R. 1971 S. C. 315.

"'permit' means the document issued by (the Commissioner) a State or Regional Transport Authority authorizing the use of a transport vehicle as a contract carriage, or stage carriage or authorising the owner as a private carrier or public carrier to use such vehicle".

Therefore, the permit is a document which enables a owner of a vehicle to ply it. The necessity for permit it underscored under section 42. That may be extracted and which is extracted as under:

"No owner of a transport vehicle shall use or permit the use of the vehicle in any public place (whether or not such vehicle is actually carrying any passenger or goods) save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority (or the Commission) authorizing the use of the vehicle in that place in the manner in which the vehicle is being used."

That does not prescribe any age limit. Section 4 of the Motor Vehicles Act, in contradistinction, talks of age limit for driving a motor vehicle prescribing 21 years. Likewise, grant of a conductor's licence is dealt with under section 21 (C) (*i*) which states "No person under the age of eighteen years shall hold, or be granted, a conductor's licence". If in considering the grant of the stage carriage permit section 47 lays down the criteria for consideration and even by implication does not prohibit a minor being a permit holder, I am unable to see as to why a minor cannot be a permit holder. In fact, rule 156 prescribes the application for permit stating that in respect of stage carriage the form is SCPA. By G. O. Ms. No. 2179 (Home), dated 29th November, 1975 (Column (*c*)) has been introduced. It says that if the applicant is a minor, full name and address of the guardian should be given. Therefore, all these provisions to take within them a minor being an applicant and if therefore a minor could well be granted a permit it cannot be said that a minor has no capacity to contract under section 11 of the Contract Act and therefore he is incompetent to apply for a permit. I am unable to accept the argument of the learned Advocate-General that because this is a trading contract and not beneficial to the minor, he cannot be a permit holder. He cited ***Mercantile Union Guarantee Corporation Limited*** v. ***Ball***[1]. It dealt with the case of a contract to purchase a lorry on a hire purchase system which related to the legal necessity of the minor which is not the case here. As correctly contended by Mr. Ramaswami, under the legislative practice for the holding the permit if no age limit is prescribed, this Court cannot so interpret it as to bring in other considerations of legalnecessity or benefit to the minor. In all statutes wherever a minor was sought to be excluded from holding the licence, it has been specifically done so. Taking for instance, section 6 of the Cinemas Regulation Act or the Arms Act. Therefore, I hold that a minor could be a permit holder. However, he can act only through a guardian. One of the extreme cases that was cited before me is *B. B. Rao* v. *State*[2], wherein it was held that because the provision of the Code of Civil Procedure would not apply, an application for the grant of a motor vehicle signed by a minor could be treated to be a valid application. With great respect this decision does not appear to lay down the correct law. Whatever it is, from the amendment introduced to the form prescribed under rule 156, it is clear that only a guardian can act on behalf of the minor. In Paterson's Licensing Act at page 782, it is stated that infancy *per se* has not been made a disqualification. Therefore, the conditions attached to a permit which can be validly imposed in the case of stage carriage under section 48 (3) can be enforced as against the permit. In other words, it is the permit that suffers the punishment under section 60 of the Act. It has nothing to do with the ownership of the vehicle in law. This is because the consequence of cancellation or suspension of permit would disable the operator from plying the vehicles. Section 42 is emphatic in its terms when it says that no owner of a transport vehicle shall use or permit the use of the vehicle in any public place without a valid permit. Even with regard to the penal provisions, the enforcement can be as against the guardian. Sections 79, 80, 88 and 94 of the Act are some of the sections which have a bearing on this aspect. It is section 112 which provides

1. (1937) 3 All E R. 1.
2. (1970) 1 An.W.R. 196 ; A. I. R. 1970 A. P. 395.

for punishment for offences. That punishment can be enforced against the guardian. Therefore, there is no difficulty in holding that the minor can be a permit holder.

5. The next question is whether, in the instant case, during the lifetime of the father, mother could be the guardian. This necessitates me to refer to some of the important provisions of the Hindu Minority and Guardianship Act. Section 2 reads as follows :

> "The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Guardians and Wards Act, 1890".

Section 4 *(c)* is as under:

> " 'natural guardian' means any of the guardians mentioned in section 6".

Section 6 (*a*) is as follows :

> "6. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
>
> (a) in the case of a boy or an unmarried girl the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

(the rest is omitted as unnecessary).

Therefore, by a reading of this provision it is clear that during the lifetime of a father, mother cannot be the guardian because of the words "and after him" occurring in clause (a) of section 6. There is an added reason for holding so. Because this right of guardianship is a valuable right and the Hindu father, under section 9 of Act, who is entitled to act as natural guardian for minor, may by will appoint a guardian in respect of minor's person or property or in respect of both. An appointment made under subsection (1) of section 9 shall have no effect if the father predeceases the mother but shall revive if the mother dies without appointing by will, any person as guardian. As regards the right of a *de facto* guardian, section 11 says as under:—

> "After the commencement of this Act, no person shall be entitled to dispose of or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor".

I am unable to accept the argument of Mr. M. N. Rangachari because section 4 (*c*) states that "natural guardian" means any of the guardians mentioned in section 6. Mother also will get included as otherwise section 4 (*c*) must be held to be redundant. The simple meaning of section 4 (*c*) is that it refers to all the guardians as are referred to in section 6 in the stated situations. There is no redundancy whatever. One of the cases that is relied on is *Jijabai* v. *Pathankhan*[1], But that is a peculiar case and I do not think that that ruling over intended to say that even during the lifetime of the father, mother could be the guardian. In that case, the father and the mother had fallen out for more than 20 years and the father was not taking care of the minor's interest and it was the mother who alone was acting as guardian throughout. Therefore a finding was rendered by the Revenue Court that the mother may be construed to be the natural guardian which finding was accepted by the High Court and met with its approval at the hands of the Supreme Court at the end of paragraph 11 of its judgment which is as follows :

> "The position in the Hindu Law before the enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian".

Even here what requires to be noted is normally when the father is alive he is the natural guardian in the decision of the Supreme Court. But in the peculiar circumstances of the case, the mother was considered to be the guardian. Therefore, this decision does not assist the petitioner in any way. In the partition that took place between the parties

1. (1971) 2 S. C. J. 17 : A. I. R. 1971 S. C. 315.

obviously as against the father, mother alone could represent the minor. The fact that a few sales wherein the minor was a purchaser was transacted by the mother on behalf of the minor, that cannot deprive the father of his right. There is no evidence on this aspect that the father was unwilling to act nor again was he acting adverse to the interests of the minor. It is somewhat surprising to note that the Tribunal had just slurred over this argument by stating in paragraph 8 as follows :

> "Now we are only left with the respondent and 1st appellant who have scored equal number of marks. The learned counsel appearing for the 1st appellant contended before me that when the minor respondent's father is alive, he could not be represented by his mother as guardian under the Hindu Law. I see no force in this contention, for the appellant has no *locus standi* to question either the mother or father acting as guardian for their minor son. The Hindu Law does not prohibit the mother acting as guardian for a minor son even though the father is alive".

To say that because there is no prohibition the mother could act as guardian seems to be overstating the law without looking into the relevant provision of section 6 of the Hindu Minority and Guardianship Act which, as I said, gives the right to the mother only after the father. Therefore, I uphold the argument of the learned Advocate-General that the application on behalf of the minor represented by the mother and guardian in the facts and circumstances of the case is incompetent. This is not to be understood as though I hold that the mother cannot be the guardian. It is one thing to say that the mother could be guardian under certain circumstances. For instance, it would not be in the welfare of the minor to appoint the father as the guardian for several reasons namely, where he is acting against the interests of the minor or where he is not fit to be the guardian etc., I must also state that by agreement between the parties this right of guardianship cannot be taken away from the father since the statute gives him an indefeasible entitlement under normal circumstances. I make it clear that I am only deciding the question of competency of the application and not the right of the mother to represent the minor.

6. In view of my finding that the application is incompetent, I do not think that there is any necessity on my part to go into the merits of the case. Accordingly, the civil revision petition will stand dismissed. No costs.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Management of Sri Sabari Mills Limited, K. Sathanur, Tiruchirapalli ... *Appellant**

v.

M. Kulandai ... *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 3—Watchman in a mill preventing grazing of cattle belonging to outsiders within the mill's compound—Watchman beaten resulting in serious injurious—Watchman laid in hospital for 68 days—Disabled—Claim for compensation by watchman before Additional Commissioner for Workmen's Compensation—"Accident", meaning of—"Arising out of and in course of employment"—Test—Watchman awarded compensation by the Additional Commissioner—Appeal by Mill-owner management—Watchman, held entitled to compensation—Quantum however reduced.

'*K*' was a watchman in a mill. On 29th November, 1978, he prevented '*G*'s wife from grazing cattle inside the mill's premises. On 30th November, 1978, when '*K*' was wearing his uniform in the mill's premises, '*G*' and four others attacked '*K*' with lathis and beat him severely. '*K*' received injuries and was in the hospital for 68 days. '*K*' was disabled. He could not lift any weight by his right hand and was not able to stand properly as the knees were not functioning properly. '*K*' claimed compensation from the mill management. As this was not forthcoming, '*K*' filed an application before the

*A. A. O. No. 654 of 1980, *25th March*, 1982.

Additional Commissioner for Workmen's Compensation. The Additional Commissioner was of the view that the accident took place as a result of enforcing the rules of the Mills prohibiting grazing within the premises. That being a part of his duty he would be entitled to compensation. He accordingly awarded compensation. In appeal, the management contended that it was not an accident and even assuming it was an accident, it was not in the course of employment.

Held: The word "accident" has not been defined in the Workmen's Compensation Act. It is used in the popular and ordinary sense and means a mishap or an untoward event not expected or designed. What the Workmen's Compensation Act, 1923, really intends to convey is what might be expressed as an accidental injury. It includes not only such occurrences as collisions, tripping over floor obstacles, falls of roof, but also less obvious ones causing injury, *e. g.*, strain which causes rupture, exposure to a draught causing chill, exertion in a stockhold causing apoplexy and shock causing neurasthenia. But the common factor in all these cases, is some concrete happening at a definite point of time and incapacity resulting from the happening. [*Para.* 7.]

There is hardly any general principle which can be evolved to explain and define the phrase "arising out of and in the course of employment," but attempts have been made to explain by classification *viz.*, to the nature, conditions, obligations and incidents of an employment. Whether in a given case an accident arises on the one hand out of the injured person's employment although he has conducted himself in it carelessly or improperly, or, on the other hand, arises not out of his employment but out of the fact that he was outside the scope of it or has added to it some extraneous peril of his own making or has temporarily suspended it while he pursues some incursion of his own or has quitted it altogether are all questions which are susceptible of different answers. One test which according to Lord Sumner is always applicable is, "was it part of the injured person's employment to hazard, to suffer or to do which caused his injury? If yes, the accident arose out of his employment, if no, it did not." The word 'employment' again is not to be defined in a narrow manner by reference only to the duties of the workman, but the character, conditions, incidents and special risks involved in employment would have to be considered to find out whether, the accident "arose out of and in course of" the workman's employment. [*Paras.* 9, 10.]

In the instant case, it was undoubtedly an accident because it was an unexpected event happening without design. The beating, therefore, was certainly an accident, within the meaning of the law. [*Para.* 11.]

The rules of the appellant-Mills prohibit grazing of cattle inside the premises. Therefore, as a dutiful watchman, if he prevented '*G*' s wife from grazing the cattle inside the mills, it was part of his duty as watchman. The accident in this case took place on 30th November, 1978, consequent to the beating of the watchman, was one arising out of employment as watchman, and in the course of enforcing the rules of appellant-Mills. [*Para.* 12.]

Cases referred to:—

Harris v. *Associated Portland Cement Manufactures Ltd.*, (1939) A. C. 71 ; *Jaffar Hiptullah Bhoy Ginning and Press Factory* v. *Sheikh Ismail*, I. L. R. (1937) Nag. 88 : A. I. R. 1937 Nag. 311 ; *Dhanpal* v. *Superintendent of Collieries*, (1934) 152 I. C. 1024 : A. I. R. 1934 Pat. 630 ; *Lee Shi* v. *Consolidated Tin Mines of Burma Ltd.*, (1940) 185 I. C. 847 : A. I. R. 1939 Rang. 428 ; *Padam Debi* v. *Raghunath Roy*, I. L. R. (1950) Cut. 60: A. I. R. 1950 Orissa 207 ; *Lancashire and Yorkshire Railway Company* v. *Heighley*, (1917) A. C. 352 ; *Fenton* v. *F. Thorley and Company Ltd*, 1903 A. C. 443 ; *Golden Soap Factory (P.) Ltd.* v. *Nakul Chandra Mandal*, A. I. R. 1964 Cal. 217 ; *Mackinnon Mackenzie and Co., Ltd.* v. *Miss Velma Williams*, A. I. R. 1964 Cal. 94 ; *Bhai Shakri* v. *New Manekchowk Mills Company*, A. I. R. 1961 Guj. 34.

Appeal against the order of the Additional Commissioner for Workmen's Compensation, Tiruchy, dated 7th March, 1980, and made in W. C. No. 16 of 1979.

T. S. Rangarajan, for Appellant.

S. A. Rajan, for Respondent.

The Court made the following

ORDER.—The appeal is against an award of the Additional Commissioner for Workmen's Compensation. The respondent was working as a watchman in the mills of the appellant. On 30th of November, 1978, he was attacked by four persons who entered the mill premises and assaulted him by lathis. He claimed a lumpsum payment of compensation of Rs. 17, 640, half monthly payment of Rs. 580 from 30th November, 1978 to 22nd April, 1979 and medical expenses of Rs. 905-50. His case was that he was working as a watchman and his wages were Rs. 470-60 per month. On 30th of November, 1978, when his shiftwork was between 2 P. M., and 10 P. M., he came to the mill at 1-50 P. M., placed the cycle inside the cycle stand and came straight to the watchman's shed. The duty watchman was allowed to go away and the applicant was wearing his uniform. While so wearing one Ganesan came and pulled his legs. Ganesan and four others began to beat him with lathis. The bones in two hands and the ankles of the legs were broken and the knees also received heavy blows. At that time his brother and other watchmen came shouting and immediately the culprits bolted away. The General Manager of the Mill and the Sub-Inspector of Police came to the spot. He was carried to the police station in a car and from there he was taken to the Government Hospital, Trichy. He was an inpatient in the hospital for 68 days. According to the respondent, the cause for the assault was that he seolded Ganesan's wife when she wanted to graze cattle inside the mill premises on 29th November, 1978. It was part of his duty to enforce the company rules which prohibits grazing of cattle inside the premises. Therefore, the respondent had prevented the cattle being grazed inside the premises. On account of this quarrel between him and Ganesan's wife, enmity arose and the very next day, he was attacked. As a result of the injuries sustained, the respondent was unable to lift any weight by his right hand and he is not able to stand properly as the knees are not functioning properly. In spite of the claim for compensation for the disablement suffered, the same has not been forthcoming and, therefore, the application was filed before the Additional Commissioner for Workmen's Compensation, Tiruchirapalli, claiming compensation as stated above.

2. The appellant-mill took the stand that it is true that on 30th November, 1978, the respondent was beaten. But it was not due to the quarrel that was supposed to have taken place on 29th November, 1978 between the wife of Ganesan and the workman. On the contrary, the workman tried to misbehave with the wife of Ganesan and, therefore, there was enmity between the two. The entire family of Ganesan wanted to wreak vengeance on the workman. Therefore, on 30th November, 1978, they beat the workman as a result of which the injuries had been sustained. Where, therefore, the injuries were not suffered either out of or in the course of employment, there can be no liability whatever as far as the appellant is concerned.

3. The Additional Commissioner for Workmen's Compensation. Tiruchirapally, on trial, accepted the evidence of the workman (P W. 1) and came to the conclusion that his version of the incident was true. Therefore, he was of the view that the accident took place as a result of enforcing the rules of the mills prohibiting grazing within the premises. That being a part of his duty he would be entitled to compensation. It was further found that the salary was in the range of Rs. 400 to as 500 and as per Schedule IV, it worked out Rs. 29,400 and 60 per cent. of the same would come to Rs. 17,640. He accordingly awarded a compensation of Rs. 17,640 to the workman. Hence, the appeal.

4. Mr. Rangarajan, learned counsel for the appellant, strenuously argued that first of all this is not an accident. It is a quarral between the parties resulting in criminal assault. May be. But for that the management cannot be made liable. Assuming that it is an accident, in order that the liability may be fastened on management, it must be one arising in the course of employment. Where there is evidence on record to show as spoken to by the Factory Manager, Subramanian, that Kandaswami has been dismissed because of this incident aud further suggestions have been made to P. W. No. 1 himself about his misbehaving with Ganesan's wife, that version ought to have been

accepted. As a matter of fact, a request was made by the appellant-management to reopen the case in order to determine whether the revision as spoken to by P. W. 1 was correct or not. The records relating to the domestic enquiry against Kandaswami had in fact been summoned by the Labour Union and for reasons best known, the Union did not produce the records. Those records were sought to be relied on by the management and that request had been unjustifiably turned down. As opportunity ought to have been afforded to the management to have Kandaswami examined on their side. Lastly, on the quantum it is submitted there is no total disablement, but only partial disablement. Therefore, the award of 60 per cent. is not supported.

5. In opposition, Mr. Rajan, learned counsel for the respondent-workman urges, an accident merely means an unexpected event happening without design. The workman here was a watchman. His duty was to guard the premises of the mills and the factory. When an attempt was made as spoken to by him as P. W. 1 by Ganesan's wife to graze cattle within the premises of the mill, by enforcing his duties as a watchman if enmity arose and on account of that enmity injuries have been sustained, undoubtedly the management will be liable. This is because the injuries so sustained have a close nexus to the duties of watchman or to the nature of his employment. That would be enough in law to hold that the management is liable for this unexpected event happening without any design in the course of employment as a watchman. As regards the contrary version, as stated by the management, excepting a suggestion to P. W. 1 no evidence worth the name was ever produced. Assuming the records relating to domestic enquiry against Kandaswami ought to have been looked into, they cannot have any bearing on the issue in question. To that, the workman (present respondent) was not a party. If that be so, the failure to reopen the case to enable the management to produce the records relating to domestic enquiry against Kandaswami will not be material. Even otherwise, nothing prevented the management from examining Kandaswami on their side. The factory manager who spoke on behalf of the management has stated Kandaswami had been dismissed. Therefore, that version ought not to be accepted.

6. Turning to the quantum, inasmuch as the workman has spoken to the fact that he cannot lift any weight by his right hand, it would be considered to be a total disablement and the award of 60 per cent. is correct and no interference is warranted.

7. I have got to first decide as to which of the versions in relation to the incident that took place on 30th November, 1978, is to be accepted. I deliberately use the word 'incident' because still whether that incident could be an accident within the meaning of the Act requires to be decided, which I will do so in the latter part of my judgment The version of the workman as spoken to by P. W 1 is that on 29th November, 1978, Ganesan's wife wanted to graze cattle within the premises of the mills. Therefore, as watchman he objected to this and there was exchange of words between them. Because he prevented her from grazing the cattle, on the next day all the family members of Ganesan came and beat him. This is what is spoken to in the chief-examination. In cross-examination, it is true suggestions were made that it was due to the misbehaving of the watchman with the wife of Ganesan. These suggestions have been stoutly denied. Barring this, no attempt whatever was made on behalf of the appellant-management to substantiate this version, namely, that because the workman (present-respondent) misbehaved with the wife of Ganesan, there was enmity between the watchman on the one side and Ganesan's family on the other. This incident which took place on 30th November, 1978, was nothing more than settling the score on account of this enmity. I find from the records an application was made before the Commissioner to reopen the case and to have the proceedings in relation to the domestic enquiry against Kandaswami to be gone into. To my mind it appears that the belated attempt on the part of the management was only to improve its case. Whatever it may be, in so far as the present respondent (workman) was not a party to the disciplinary proceedings against Kandaswami and the domestic enquiry against the

said Kandaswami, they cannot be used unless Kandaswami himself was examined and made available for cross-examination. I do not find from the records any attempt whatever was made seeking permission to examine Kandaswami or to reopen the case for examining the said Kandaswami. This is because in the affidavit filed by the appellant-management (which is found at page 11 of the file) in paragraph 3 it is stated thus:

> "The petitioner's authorised representative gave us a notice to produce disciplinary proceedings against one Kandaswami. This was produced and for reasons best known to the petitioner the petitioner did not make use of the same. Subsequently, the file was sent away as the papers have been summoned for our defence in an action against Kandaswami in another forum. Therefore, we could not make use of the same or file the same during the enquiry on 29th September, 1979".

If really the management was anxious to establish its version, nothing could have been easier than to examine Kandaswami. For reasons best known, the same was not done by the appellant. Therefore, I have no hesitation in rejecting this version of teh management. The result is I hold that the incident on 30th November, 1978, took place because enmity arose between respondent watchman and Ganesan's wife when the latter attempted to graze cattle within the premises of the appellant-mill. Now, on to the question, whether this would be an accident within the meaning of the Act. The word "accident" has not been defined in the Act. However, Law Lexicon states the word "accident" generally means some unexpected event happening without design even though there may be negligence on the part of the workman. It is used in the popular and ordinary sense and means a mishap or an untoward event not expected or designed. What the Workmen's Compensation Act, 1923, really intends to convey is what might be expressed as an accidental injury. It includes not only such occurrences such as collisions, tripping over floor obstacles, falls of roof, but also less obvious ones causing injury, *e. g.*, strain which causes rupture, exposure to a draught causing chill, exertion in a stockhold causing apoplexy and shock causing neurasthenia. But the common factor in all these cases, is some concerte happening at a definite point of time and incapacity resulting from the happening. Lord Atkin in *Harris* v. *Associated Portland Cement Manufactures Limited*[1], states:

> "Once you have found the work which he is seeking to do to be within his employment, the question of negligence, great or small, is irrelevant and no amount of negligence in doing an employment job can change the workman's action into non-employment job......... If a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurrred only by that way of doing it he is entitled to compensation".

8. The same principle has been followed in India in several decisions reported in *Jaffar Hiptullah Bhoy Ginning and Press Factory* v. *Sheikh Ismail*[2], *Dhanpal* v. *Superintendent of Collieries*[3], *Lee Shi* v. *Consolidated Tin Mines of Burma Limited*[4], *Padam Debi* v. *Raghunath Roy*[5].

9. The phrase arising out of and in the course of the employment is taken from the English Act, originally appearing in the Act of 1897. It has been adopted in the American and Dominion Acts. It also occurs in New Zealand Act and has the same meaning as that of the English Act. There is hardly any general principle which can be evolved to explain and define the phrase 'arising out of employment' but attempts have been made to explain it by classification, *viz.*, to the nature, condition, obligations and incidents of the employment. Whether in a given case, an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly or, on the other

1. (1939) A. C. 71 at 76,77.
2. I. L. R. (1937) Nag. 88: A. I. R. 1937 Nag. 311.
3. 152 Ind. Cas. 1024 : A.I. R. 1934 Pat. 630.
4. 185 Ind. Cas. 847: A. I. R. 1939 Ran. 428.
5. I. L. R. (1950) Cut. 60: A. I. R. 1950 Orissa 207.

hand, arises not out of his employment but out of the fact that he was outside the scope of it, or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some incursion of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds as explained by several well-known Judges and Jurists and are always questions of nicety. No universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on tsi own facts.

10. There is, however, in the opinion of Lord Summer in the case of *Lancashire and Yorkshire Railway Company* v. *Heighley*[1], one test which is always at any rate applicable, which is this "was it part of the injured person's employment to hazard, to suffer or to do which caused his injury? If yes, the accident arose out of his employment, if any, if no, it did not". The word 'employment' again is not to be defined in a narrow manner by reference only to the duties of the workman, but the character, conditions, incidents and special risks involved in employment, would have to be taken into consideration in order to find out whether the accident 'arose out of and in course of' the workman's employment.

11. On the question of the type of accident, the well-known definition of accident by Lord Macnaghten in *Fenton* v. *F. Thorley and Company Limited*[2], is "an unlooked for mishap or an untoward event which is not expected or designed". There is no difference between the English and the Indian statute as to the type of accident which gives the workman a claim to compensation (*See* Workmen's Compensation Act, 1923, section. 3). *Golden Soap Factory (P.) Limited* v. *Nakul Chandra Mandal*[3]. See also *Mackinnon Mackenzie and Company Limited* v. *Miss. Velma Williams*[4]. Therefore, in the instant case, it is undoubtedly an accident because it was an unexpected event happening without design. The beating, therefore, was certainly an accident within the meaning of the law.

1. (1917) A. C. 352, 372.
2. (1903) A. C. 443 at 448.
3. A. I. R. 1964 Cal. 217 at 219, 220.
4. A. I. R. 1964 Cal. 94.

12. Section 3 (1) of the Act throws the liability on the employer for compensation stating only "if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of the Chapter". As to what is the meaning of this can be gathered from a reading of *Bhai Shakri* v. *New Manekchowk Mills Company*[1]:

> "Since section 3 provides that the accident must arise out of and in the course of the workman's employment, the accident in order to give rise to a claim for compensation must have some casual relation to the workman's employment and must be due to risk incidental to that employment. But although, as accident must be a particular occurrence which happens at a particular time, in order that it may constitute an accident within the meaning of section 3, it is not necessary that the workman should be able to locate it in order to succeed in his claim. There would be cases where a series of tiny accidents, each producing some unidentifiable result and operating cumulatively to produce the final condition of injury, would constitute together an accident within the meaning of this section."

In view of the decision of the Gujarat High Court, the point that requires to be decided is, whether it is an accident arising out of and in the course of his employment. This is all the more so because of the language of section 3 (1) already extracted. Concerning this, the law is "arising out of and in the course of respondent-workman as a watchman". The rules of the appellant-mills prohibit grazing the cattle inside the premises. Therefore, as a dutiful watchman, if he prevented Ganesan's wife from grazing the cattle inside the mills, it is part of his duty as watchman. The accident in this case took place on 30th November, 1978, consequent to the beating of the workman, was one arising out of employment as watchman and in the course of enforcing the rules of the appellant-mills.

1. A. I. R. 1961 Guj. 34 at 35 and 36.

Therefore, I agree with the Commissioner for Workmen's Compensation on this point.

13. Turning to the quantum, I find as per Schedule IV where the pay range is from Rs. 400 to Rs. 500, the amount of compensation for permanent disablement will amount Rs. 29,400. This is not a total disablement since the workman is under the employment of the appellant-mills. I think the interests of justice would be met by awarding a compensation of Rs. 10,000 in full quit of the claims of the respondent.

14. The appeal will stand allowed in part. There will be no order as to costs. The said amount of Rs. 10,000 can be withdrawn by the workman from out the deposit made to the credit of W. C. No. 16 of 1979 on the file of the Additional Commissioner for Workmen's Compensation, Tiruchirapalli, without furnishing any security.

S. J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

S. Krishnamurthy Iyer ... *Petitioner**

v.

Ramaiah Konar ... *Respondent*

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), section 3 (2) (b) *and* (*c*)—*Petition for eviction by landlord against tenant—Allegation that the tenant put the land to a different use—Digging up of a pond raising coconut trees in double crop land let out for the cultivation of paddy, burial of dead cow in the land leased are neither agricultural nor horticultural user—Landlord entitled to order of eviction.*

*C. R. P. No. 4614 of 1982. *2nd December,* 1982.

The landlord filed a petition for eviction of the tenant alleging that he used the land for a purpose different from the one for which it was leased. The allegations were that the tenant dug a pond in the land, raised cocoanut trees in a double crop land let out for cultivation of paddy and buried a dead cow in the land leased. He had also used the land for non-agricultural purposes resulting in injury to the lands and also reduction in its value. The Revenue Court declined to grant an order of eviction. On revision by the landlord,

Held, that the raising of cocoanut trees in double crop nanja lands involves the digging of pits and when the cocoanut trees grow up they are deeply embedded in the soil and the soil is thus rendered less fertile and unfit for paddy cultivation. In other words it will be in the nature of an act which is injurious to the land. While the raising of cocoanut trees by itself is an act which is injurious to the lands the further digging up of a pond for purpose of irrigating the cocoanut saplings would also be an act which is really destructive of an injurious to the land. The admitted digging up of the pond by the respondent and using the earth therefrom for the purpose of providing a kalam would undoubtedly attract section 3 (2) *(b)* as well as section 3 (2) (*c*) of the Act.

[*Paras.* 7, 9, 10.]

A consideration of the entire matter shows that the respondent had, in the double crop lands leased out to him for the purpose of paddy cultivation, dug up a pond, buried a cow, created a samadhi over that and also put up a thatched roof and had also raised cocoanut trees thereon. These acts would result in the forfeiture of the protection from eviction conferred on the tenant under section 3 (1) of the Act. The Revenue Court was in error in declining to order eviction of the respondent. [*Para.* 13.]

Cases referred to:—

Sattayappa Thevar v. *Sambanda Thevar,* 1973 T. L. N. J. 14 ; *Rosathal* v. *Palani Gounder,* (1980) T. L. N. J. 264 ; *Muthukrishna Chettiar* v. *Kanni Konar,* (1959) 1 M. L. J. 208 : (1959) 72 L. W. 223.

M. G. Natarajan, R. B. Kannan and *R. Sambamurthy,* for Petitioner,

G. Masilamani, K. Surendranatan and *T. P. Manoharan*, for Respondent.

The Court made the following

ORDER.—The landlord is the petitioner in this civil revision petition, which is directed against the order of the Revenue Court, Tiruturaipoondi in P. No. 94 of 1981, dismissing the application filed by the petitioner herein praying for an order of eviction against the respondent. Admittedly, the petitioner is the owner of four items of properties in Survey Nos. 278/6, 278/5, 297/2-A and 278/3, totalling to 4 acres and 43 cents and these lands had been leased out to the respondent herein for purposes of cultivation of paddy, subject to payment of rent at 67½ kalams of paddy and an additional rent of 2 kalams per mah for the second crop. According to the case of the petitioner, the lands are nanja lands irrigated by river water and that the lands had to be used only for agricultural purpose, but that contrary to this, the respondent had dug out a pond in a portion of the property leased and has also put up a samadhi for a cow and this, according to the petitioner, resulted in the conversion of nanja land into punja land. In addition, the petitioner also put forth the plea that the respondent had raised coconut trees in the land leased out for cultivation of paddy and had misused the land leased out to him and had also used the lands for non-agricultural purposes resulting in injury to the lands and also reduction in its value. A notice was sent by the petitioner demanding surrender of possession of the lands, but the respondent did not surrender the properties but had sent a reply containing false statements that these acts attributed to the respondent were done with the knowledge and consent of the petitioner. The petitioner stated that the stand taken by the respondent in his reply notice was false and unsustainable and that he had no right whatever to use the lands for a different purpose and also cause injury to the leasehold property by his own acts and on these grounds prayed for an order of eviction against the respondent herein.

2. In his counter, the respondent stated that there was not enough facility for kalam and, therefore, with the permission of the petitioner, a part of the lands leased adjoining the *manaicut* of the respondent was converted into a kalam and used as such. The respondent also stated that the petitioner suggested that coconut cultivation may be done in the ridges and that only with his permission, coconut trees had been reared in the ridges. The respondent admitted the digging of a pond in the lands leased out to him and stated that with the earth made available thereby, the kalam had been formed and that the water in the pond was being used for the purpose of irrigating the coconut trees. The respondent claimed that the provision for a kalam and the raising of coconut trees were agricultural operations and they cannot be considered to be acts injurious to the land leased. The burying of a dead cow in a portion of the lands was admitted. But, the respondent denied the putting up of any samadhi over that place. The respondent refuted the claim of the petitioner that he had used the lands for non-agricultural and non-horticultural purposes and that he has committed acts destructive of or injurious to the lands.

3. Before the Revenue Court, the petitioner examined himself as P. W., 1 and a neighbouring landowner, as P. W. 2, and marked Exhibits P-1 and P-2, copies of the notices issued by the petitioner and the reply for that from the respondent. The wife of the respondent was examined as R, W. 1, and Exhibits R-1 and R-2 were relied on his behalf. With a view to ascertain the physical features and the condition on ground of the properties leased out to the respondent, the petitioner prayed for the appointment of a Commissioner and the Revenue Court deputed the Revenue Inspector of Thiruturaipoondi to inspect the lands in question and also send a detailed report. On a purported consideration of the evidence, the Revenue Court found that the coconut trees were planted with the knowledge and permission of the petitioner, that the digging of a pond is only for storing water required for watering the coconut trees, that the digging of a manure pit cannot be stated to be for non-agricultural purposes, that the burying of a dead cow which is worshipped by the Hindu community cannot be stated to cause any injury to the land and that the putting up of a thatched shed over the place where the cow is burried was not for residental purposes or other purposes

unconnected with agriculture and therefore, the petitioner has not made out a case under section 3 (2) (*c*) of the Tamil Nadu Cultivating Tenants Protection Act XXV of 1955 (hereinafter referred to as the Act). In this view, the application for eviction filed by the petitioner was dismissed. It is the correctness of this order that is challenged in this civil revision petition.

4. Before proceeding to consider the entitlement of the petitioner for an order of eviction, it is necessary to ascertain precisely the grounds upon which eviction is sought, as in the application for eviction filed by the petitioner, the provision of law quoted is section 19-B of the Act. Indeed, there is no such section under the concerned enactment. But, merely because the petitioner has not given the correct provision of law, the petitioner cannot be denied reliefs under the appropriate provisions, if the petitioner otherwise establishes a case for such relief. Under section 3 (2) (*b*) of the Act, the protection afforded to a cultivating tenant from eviction under section 3 (1) is not available if the tenant has done any act or has been guilty of any negligence which is destructive of or injurious to the land or any crop thereon or has altogether ceased to cultivate the land. Likewise under section 3 (2) (*c*) of the Act, a tenant who had used the land for any purpose not being an agricultural or horticultural purpose will also forfeit such protection. A reading of paragraph 7 of the application for eviction discloses that the complaint of the petitioner is that the respondent had dug out a pond and had also put up a samadhi and had raised coconut trees and these acts would constitute user of the land for a purpose which is neither agricultural nor horticultural and that these acts have also caused injury to the lands leased out to him. In other words, though the petitioner has mentioned section 19-B of the Act, yet, it is seen from the contents of the application that the application really is one which falls under section 3 (2) (*b*) and (*c*) of the Act. Therefore, the question whether on the materials the petitioner is entitled to an order for eviction or not has to be approached and decided keeping in view the aforesaid provisions of law.

5. Earlier, it has been noticed that the Revenue Inspector, Tiruturaipoondi, was appointed as the Commissioner to make on the spot inspection of the lands in question and submit report. In the course of his report, the Commissioner has stated that portions of survey No. 270/2-A, which is a nanja land, are being used by the respondent for raising coconut trees and also plantain cultivation. The Commissioner has also noticed that in a portion of Survey No. 279/2-A, a dead cow had been buried and that a samadhi had been built to mark the place of its burial and further a thatched roof has been put up over that. With reference to another portion in the same survey number, the Commissioner had found that the respondent had dug a manure pit. It has also been observed by the Commissioner that the respondent had converted the nanja land into punja lands. As regards survey No. 278/3 also, the Commissioner had noticed the planting of coconut trees. No objection whatever had been filed by the respondent to the features noticed by the Commissioner and mentioned in this report.

6. The petitioner, examined, as P. W. 1, in the course of his chief-examination, has stated that the lands leased out to the respondent are double crop lands irrigated by river and that therein the respondent had buried a cow and put up a roof over that and that he had also issued a notice to the respondent. The notice referred to is Exhibit P-1, where the petitioner has charged the respondent with having dug up a pond and put up a samadhi for a cow. In the reply, Exhibit P-2, the respondent has admitted that a threshing floor had been put up by him with the earth made available by the digging up of the pond and that the building of a samadhi was encouraged by the petitioner. The evidence of P. W. 2, who is a neighbouring landowner is also to the effect that the respondent had buried a cow in the field and had put up a samadhi and also a thatched roof. He has also spoken to the digging up of a pond. P. W. 2 has also witnessed the burying of the dead cow and has further stated that the samadhi has been raised to a height of 2 feet in the middle of the field. R. W. 1, in the course of her evidence, would

admit the burial of the cow, but would state that it was in the ridge. She would also further state that no samadhi has been put up. In the course of her cross-examination, she would admit that on Tuesdays and Fridays a lamp is lit at the place where the cow is buried. She would admit the digging of a pond and also a manure pit. With reference to the digging up of the pond, R. W. 2 categorically admitted that no permission was taken from the petitioner. She would also further admit that no permission was obtained from the petitioner for the putting up of a samadhi for the cow, as according to her, no samadhi was put up at all.

7. It is thus seen from the counter of the respondent and also the evidence of R. W. No. 1 that a pond had been dug in the lands leased out to the respondent. It is also clear from the evidence of R. W. 1, that no permission was obtained from the petitioner. In this situation, the question is, whether coconut cultivation and the digging up of the pond in a double crop land, which had been let out for cultivation of paddy, would be acts which are destructive of or injurious to the lands and would also amount to user of the land for a purpose which is neither agricultural nor horticultural. There is no dispute between the parties that the lands has been originally leased out only for purposes of paddy cultivation and that the respondent has been measuring paddy rent. The raising of coconut trees as seen from the report of the Commissioner is not only on the ridges as claimed by the respondent, but extends to portions of the survey numbers leased out to the respondent. The raising of coconut trees in double crop nanja lands would undoubtedly be an act which would be injurious to the lands though it may be that if would still be a horticultural purpose. The raising of coconut trees in double crop nanja lands involves the digging of deep pits and when the coconut trees grow up they are deeply imbedded in the soil and the soil is thus rendered less fertile and unfi for paddy cultivation. In other words, it will be in the nature of an act which is injurious to the land. In addition, in this case, even in the counter, the respondent had admitted the digging up a pond, though he would claim that it is for the purpose of irrigating the coconut saplings. When the raising of coconut trees by itself is an act which is injurious to the lands the further digging up of a pond for the purpose of irrigating the coconut saplings would also be an act which is really destructive of and injurious to the land.

In *Sattayappa Thevar* v. *V. Sambanda Thevar*[1], the question arose whether if a single crop is raised in a double crop land, the tenant can be stated to have committed any act which is injurious to the land. Kailasam, J. (as he then was), held that it could be inferred that the value of the land would be adversely affected if only a single crop is cultivated in a double crop land and there will be injury to the land value. If the mere cultivation of a single crop in a double crop land by itself has been held to bean act injurious to the land, it would be all the more so in a case like the present where the respondent admittedly had dug up a portion of the cultivable lands leased out to him for purposes of a pond.

9. In *Rosathal* v. *Palani Gounder*[2], Varadarrajan, J. (as he then was), had to consider whether the digging up of a pit in the agricultural land demised would diminish the utility of the land and is also destructive of or injurious to the land. The learned Judge held that the tenant had no right to dig a pit and remove the earth which has been found to be fertile and that such an act would be destructive of or injurious to the land and, therefore, he is liable to be evicted under the provisions of section 3 (2) (*b*) of the Act. In the present case, also admittedly the lands demised are double crop lands irrigated by river and intended for cultivation of paddy. It is admitted by the respondent in paragraph 2 of the counter that the earth dug out from the land for the purpose of formation of a pond had been utilised in making provision for a kalam. That would mean that fertile cultivable agricultural land has been dug up for the purpose of removing the earth therefrom to form a kalam. Such an act

1. 1973 T. L. N. J. 14.
2. 1980 T. L. N. J. 264.

is really destructive of or injurious to the land in that the area occupied by the pond cannot be put to either agricultural or horticultural use for purposes. Therefore, the admitted digging up of the pond by the respondent and using the earth therefrom for the purposes of providing a kalam would undoubtedly attract section 3 (2) (*b*) as well as section 3 (2) (*c*) of the Act in the instant case.

10. The burial of the cow has been admitted by the respondent in his counter, though there was an attempt in the course of the evidence of R. W. 1 to say that such burial was in the ridge. The report of the Commissioner belies it. Likewise, though R. W. 1 made an attempt to deny the existence of the samadhi, the report of the Commissioner clearly establishes the existence of the samadhi and P. W. 2's evidence is also to the effect that it is in the middle of the field. Even in the notice Exhibit P-1, building of a samadhi has been referred to by the petitioner and has been admitted by the respondent in his reply notice Exhibit P-2, though during the course of the evidence there was an attempt by R. W. 1 to deny the building up of a samadhi. The report of the Commissioner referred to earlier clearly makes out the existence of the samadhi over the place where the cow is buried and also the putting up of a thatched roof over that. A part of the double crop agricultural land given to the respondent for paddy cultivation has been used by the respondent for the purpose of burying carcass. To put it differently the respondent has converted the cultivable agricultural land into a burial ground for the animals. Even according to the evidence of R. W. 1 no permission was taken for the digging up of the pond as it was a small one and that no permission for putting up of as samadhi was secured, as no samadhis such was put up. This evidence of R. W. 1 would clearly indicate that the petitioner had not permitted the digging of the pond or even the putting up the samadhi and in those circumstances, the respondent cannot plead that section 3 (2) (*b*) and (*c*) of the Act would not apply. In such a case, undoubtedly the land cannot be stated to be used for a purpose which is either agricultural or horticultural and clearly, therefore, section 3 (2) (*c*) of the Act would stand attracted to this kind of user made by the respondent.

11. In *Muthukrishna Chettiar* v. *Kanni Konar*[1], the question arose whether the use of a portion of the land as a fuel depot would amount to putting the land for agricultural or horticultual purposes. Rajagopalan, J., held that the use of the land as a fuel depot is not putting the land either for agricultural or horticultural purposes and that the liability for eviction from the entire holding will arise under section 3 (2) (*c*) of the Act. It was also further pointed out that the extent of the land is immaterial in deciding whether an act had been committed which would fall within the scope of section 3 (2) (*c*) of the Act. In the light of the principles laid down in the decision referred to above, the burying of the cow and the putting up of a samadhi as well as a thatched roof over that would undoubtedly be user of the land for a purpose not being an agricultural or horticultural one within the meaning of section 3 (2) (*c*) of the Act.

12. An attempt was also made by the learned counsel for the petitioner that the respondent had dug up a manure pit also in the lands intended for cultivation and that would also fall under section 3 (2) (*b*) and (*c*) of the Act. A perusal of the application for eviction, however, shows that it has not been made a ground fot seeking an order of eviction against the respondent and it is, therefore, unnecessary to consider that.

13. Thus, on a consideration of the entire matter it is seen that the respondent had, in double crop lands leased out to him for the purpose of paddy cultivation, dug up pond, buried a cow, erected a samadhi over that and also put up a thatched roof and had also cultivated coconut trees thereon. These acts would result in the forfeiture of the protection from eviction conferred on the tenant under section 3 (1) of the Act. The Revenue-Court was therefore, in error in declining to order eviction of the respondent. Consequently, the order of the Revenue Court is set aside and the respondent will stand vacated from his holdings. The civil revision petition is, therefore, allowed with costs.

R. S. —— *Petition allowed.*

1. (1959) 1 M. L. J. 208 : 72 L. W. 223.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam and G. Maheswaran, JJ.*

Pushpavalli Ammal ... *Petitioner**

v.

Revenue Divisional Officer (Appellate Authority under Debt Relief Act), Nagapattinam and others ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), *section 4 (2)—Scope and applicability—The Tamil Nadu Debt Relief Act (XXXI of 1976), section 3 (*b*)—'Small farmer'—Definition.*

A debtor filed an application under section 6 (1) (*a*) of the Tamil Nadu Act XIII of 1980 claiming benefits under that Act and seeking a certificate of redemption in respect of a mortgage debt of Rs. 2,200, which was borrowed on a mortgage of her property. In those proceedings the creditor remained *ex parte* and the Tahsildar, treating the application as one filed under the Tamil Nadu Act XXXI of 1976 dismissed the same on the ground that the loan was obtained on 19th March, 1972, that the petitioner was a "small farmer," and that as such she was not entitled to any benefits under the 1980 Act. The matter was taken up in appeal and the appellate authority also took the view that the petitioner-debtor owned more than one unit of land and was not entitled to the benefits of that Act. The said decision of the appellate authority was challenged by the petitioner-debtor by a writ petition.

Held: Once a debt is found to be a debt covered by the 1980 Act, the question will arise whether the debtor is entitled to the benefits of that Act. No distinction is made between a pre-1976 debt and post-1976 debt for the purposes of the application of the 1980 Act. It is true that under section 4 (2) of the 1980 Act where a debtor is entitled to claim the benefits of the 1976 Act, he cannot claim the benefits of the 1980 Act. The object of that provision appears to be that the debtor who can claim the benefits of the 1976 Act cannot claim also the benefits under the 1980 Act. That provision cannot however be understood as making a distinction between pre-1976 and post-1976 debts. [*Para. 3.*]

For the application of the 1980 Act, one has to consider whather the debtor is barred by the provisions of section 4 (2) of the 1980 Act to claim the benefits under the 1980 Act. it is in the light of this provision one has to find out whether the petitioner can claim benefit of 1980 Act and whether the 1976 Act is a bar so far as she is concerned. The appellate authority has specifically found that the petitioner owns one acre of double crop wet land and 1.33 acres of dry lands totalling more than one unit of land. Section 3 (*b*) of the 1976 Act defines "small farmer" as a person owning less than one unit land, if he does not belong to any of the scheduled tribes. Therefore in this case the debtor is not a small "farmer" who has borrowed or incurred a debt before the commencement of the 1976 Act. The petitioner is not a 'small farmer' as she is holding more than one acre of wet land, sne is not a 'debtor' as defined in 1976 Act, and she is not entitled to claim any benefit under the 1976 Act. Hence section 4 (2) of the 1980 Act is not a bar for the petitioner claiming the benefits under the 1980 Act. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent in D. R. P. No. 5 of 1981, dated 30th May, 1981, and quash the same.

G. Rajan, for Petitioner.

S. Jagadeesan, for Government Pleader on behalf of Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—The petitioner herein filed an application under section 6 (1) (*a*) of the Tamil Nadu Act XIII of 1980, hereinafter referred to as the 1980 Act, before the 2nd

*W. P. No. 8441 of 1981. *2nd February,* 1982

spondent claiming benefits under the 1980 Act and seeking a certificate of redemption in respect of a mortgage debt of Rs. 2,200 which she had borrowed from the third respondent herein, on a mortgage of her property. In those proceedings the creditor remained *ex parte* and the second respondent, Tahsildar, treating the application as one filed under the Tamil Nadu Act XXXIII of 1976, hereinafter referred to as the 1976 Act, dismissed the same on the ground that the loan was obtained on 19th March, 1972, that the petitioner was a small farmer and that as such she was not entitled to any benefits under the 1980 Act. The matter was taken up in appeal to the first respondent by the petitioner. The first respondent took the view that as the mortgage loan was obtained for the purchase of three certain other lands, the loan amount should be taken to represent the price of immovable property purchased by the petitioner-debtor and that therefore it was not a debt within the meaning of the Debt Relief Acts, but one exempted by the provisions in section 12 (*b*) of the 1980 Act. The first respondent also held that since the loan was incurred in the year 1972, prior to the commencement of the 1976 Act, the petition-debtor, who owned more than one uuit of land was not entitled to the benefits of that Act. The said decision by the appellate authority has been challenged by the petitioner-debtor in the present writ petition on the ground that the authorities below have erred in proceeding on the basis that the petitioner has claimed benefits under the 1976 Act, while the application filed by her was only under section 6 of the 1980 Act.

2. In this case, the question is, whether the order of the appellate authority is liable to be quashed by this Court as arbitrary and illegal. The reasons given by the first respondent-the appellate authority for rejecting the petitioner's claim for benefits under section 6 of the 1980 Act are:

1. that the debt in question is one of the exempted debts set out in section 12 (*d*) and that therefore the petitioner is not entitled to claim the benefit in respect of the said debt;

2. that the debt having been incurred in 1972, prior to the commencement of 1976 Act, the case of the petitioner has to be dealt with only under the 1976 Act; and

3. that the petitioner owns more than one acre of double crop lands and that therefore her total holdings exceeds one unit and she is not entitled to the benefit under the 1976 Act.

It is seen that the mortgage debt was incurred by the petitioner for purchasing some other lands. Though the petitioner originally disputed the fact that the money was borrowed for purchase of lands, the recital in the document clearly indicated that the mortgage debt was incurred by the petitioner only for purchasing other lands. The first respondent has taken the view that since the loan was taken for the purpose of purchasing an immovable property, it should be taken to be the purchase price of the property purchased by the petitioner. We are not inclined to agree with the said view of the first respondent. The fact that the borrowal was for the purpose of enabling the petitioner to purchase an immovable property does not make the debt as one representing the purchase price of the property. Normally purchase price is payable to the vendor and the debt can be said to represent the purchase price only if the consideration for the sale due to the vendor is outstanding. In this case, merely because the loan was taken for the purchase of immovable property. the said loan amount cannot be taken to represent the purchase price of the property purchased by the petitioner. The object for which the loan was taken cannot make the debt as one representing the sale price of the property purchased. Therefore the said reasoning of the first respondent is legally untenable.

3. Once the debt is found to be a debt covered by the 1980 Act, then the question will arise whether the petitioner is entitled to the benefits of the 1980 Act. The first respondent has taken the view that since the debt in question is a prior 1976 debt, it should be dealt with only under the 1976 Act. We do not see any support for this view from the provisions of the 1980 Act. No distinction is made between pre-1976 debt and post-1976 debt for the purpose of application of the 1980 Act. It is no doubt true that section 4 (2) of the 1980 Act states that where a debtor is entitled to claim the benefits of the 1976 Act, he cannot claim the benefits of the 1980 Act. The object of that provision appears to be that the debtor who can claim the benefits

under the 1976 Act cannot claim the benefits under the 1980 Act. That provision in terms cannot be understood as making a distinction between pre-1976 debts and post-1976 debts, as has been interpreted by the first respondent.

4. For the application of the 1980 Act, one has to consider whether the debtor is, barred by the provisions of section 4 (2) of the 1980 Act, to claim the benefits under the 1980 Act. It is in the light of that provision we have to find out whether the petitioner can claim the benefits of 1980 Act and whether the 1976 Act is a bar so far as she is concerned. The appellate authority has specifically found that the petitioner owns one acre of double crop wet land and 1.33 acres of dry lands, totalling more than one unit of land. Section 3 (*b*) of of the 1976 Act defines "small farmer" as a person owning less than one unit land, if he does not belong to any of the scheduled tribes. Therefore, the debtor in this case is not a small farmer, who has borrowed or incurred a bebt before the commencement of the 1976 Act. On the finding of the first respondent himself that the petitioner is not a small farmer, as she is holding more than one acre of wet land, she is not a debtor as defined in the 1976 Act, and she is not entitled to claim any benefit under the 1976 Act. Hence section 4 (2) of the 1980 Act is not a bar for the petitioner claiming the benefits under the 1980 Act.

5. In this view, we allow the writ petition and quash the proceedings of the first respondent, with a direction to the first respondent to decide the appeal afresh in the light of the observations made above. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

State Bank of India, represented by its Branch Manager, Contonment, Trichi ... *Petitioner**

v.

M/s. Balakrishna Sugar Factory Limited, Musiri by Managing partner, Musiri, Tiruchi ... *Respondent.*

Civil Procedure Code (*V of* 1908), *Order 34, rule 10—Scope and peculiar features—Rule 10 an echo of section 72, Transfer of Property Act* (*IV of* 1882)—*Covers the several items of expenditure incurred by mortgagee under section 72, T. P. Act—State Bank of India obtaining preliminary mortgage decree on 18th October, 1975—Final decree passed on 24th July, 1976—Execution—Sale of hypotheca—Property purchased by one* 'P' *for Rs. 4,40,500—Auction-purchaser depositing Court the sale price—Withdrawal by the Bank from Court deposit decretal amount with subsequent interest and costs—Bank applying subsequently for insurance premium paid in respect of the mortgaged property—Execution application by the Bank for an order for payment out of the same—Whether tenable—Dismissal of application by Executing Court—Revision against order allowed.*

The State Bank of India, the petitioner in this revision petition obtained a mortgage decree against the respondent for Rs. 2,79,145 and for costs. The preliminary decree was passed on 18th October, 1975, and the final decree on 24th July, 1976. Subsequently the Bank moved the Court for bringing the mortgaged property to sale. The Court ordered the sale of the hypotheca. On 4th January, 1978, the property was purchased by one '*P*' for Rs. 4,40,500. The purchase price was deposited into Court by the auction-purchaser. The Bank withdrew from Court deposit the decree amount with subsequent interest and costs. Later on it was found that the Bank had paid

*C. R. P. No. 1051 of 1979. 31*st October*, 1980.

Insurance premium on the mortgaged property, amounting Rs. 5,421.46. The Bank accordingly filed an execution application before the Court for an order for payment out, of this sum, from the balance of the sale price in deposit in Court. This application was opposed by the judgment-debtor. The application was dismissed as not maintainable. On revision by the Bank,

Held: Order 34, rule 10, Civil Procedure Code, has more than one feature of significance. It lays down an exception to the general rule in execution that a decree-holder is unalterably fixed to the amount decreed provided in the suit and enables the mortgagee to claim over and above the amount decreed under the preliminary mortgage decree certain further sums of money, sums of a kind which could not possibly have entered into the reckoning in the preliminary decree, such as costs, charges and expenses incurred by the mortgagee as mortgagee subsequent to the passing of the preliminary decree. [*Para.* 3.]

A second feature is that when a claim is made under this Rule in execution the Court has no choice except to entertain the mortgagee's claim and determine it. If on inquiry the Court finds that the claims relate to costs, charges and expenses properly incurred by the mortgagee subsequent to the preliminary decree, the Court is under a mandatory duty to add those post-decree, costs, charges and expenses in the very processes of the execution of the mortgage decree. [*Para.* 4.]

Yet another feature of Order 34, rule 10 is that the mortgagee can go on seeking the aid of the executing Court for recovery of his post-decree claim against the mortgagor till the decree as finally adjusted is paid to the last pie. [*Para.* 5]

Order 34, rule 10 may be described as a procedural echo of section 72, Transfer of Property Act. The section makes a separate provision relating to insurance premia paid by the mortgagee and these also are amenable to be incorporated in the mortgage debt and recoverable as such by the mortgagee. Though Order 34, rule 10 does not in terms refer to section 72 of the Transfer of Property Act, the epithet "properly in the expression 'Costs, charges an expenses properly incurred" in Order 34, rule 10 of the Code, might cover the several items of expenditure provided for in section 72 of the Transfer of Property Act. [*Paras.* 6, 7.]

The whole idea behind Order 34, rule 10 seems to be not only to deal with the execution of mortgage decrees as *sui generis* but to avoid a multiplicity of proceedings between the mortgagee and the mortgagor as respects the same subject-matter. The provision certainly makes it a quite clear and easy remedy to the mortgagee. But it is also a convenient proceeding both for the parties to the mortgage suit and for the Court itself. It is quite conceivable that already at the trial of the mortgage suit, materials might have been brought on record by either party, some of which might well form the very basis of the mortgagee's subsequent claim before the executing Court for reimbursement of post-decree costs, charges and expenses. In any case, the executing Court cannot shy at an inquiry into the mortgagor's subsequent claims since the whole object of Order 21, rule 10 is that the mortgagee's dues, must obtain a final adjustment once for all, in the very suit and its follow-up execution proceedings. With a provision as this, and a mandatory provision at that, it must be held that a separate suit not only does not lie, but it would be no good to anybody in this world—parties, counsel and Court included—if it does lie at all. [*Para.* 8.]

Cases referred to:—

Dambar Singh v. *Kallyan Singh*, (1922) 20 All. L. J. 170 ; *Uttam Kunwar* v. *Krishna Pal Singh*, A. I. R. 1960 All. 659.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Tiruchirapalli, dated 28th September, 1978, and made in E. A. No. 330 of 1978 in E.P. No. 53 of 1977 in O. S. No. 336 of 1974.

T. R. Mani, for Petitioner.

C. Chinnasami, for Respondent.

The Court made the following

*Order.—The State Bank of India, the petitioner in this civil revision petition obtained

*28*th October*, 1980.

a mortgage decree against the respondent for Rs. 2,79,145 and for costs. The preliminary decree was passed on 18th October, 1975. The final decree was passed on 24th July, 1976. Subsequently, the Bank moved the Court for bringing the mortgage property to sale. The Court ordered the sale of the hypotheca. On 4th January, 1971, the property was purchased by one Periasami for Rs. 4,40,500. The purchase price was deposited into Court by the auction-purchaser. The Bank withdrew from Court deposit the decree amount with subsequent interest and costs. Later it was found that the Bank had paid insurance premia on the mortgag property, amounting in all to Rs. 5, 421.46. The Bank accordingly filed an execution application before the Court for an order for payment out of this sum from the balance of the sale price in deposit in Court. This application was opposed by the judgment-debtor. The learned Subordinate Judge, Tircuhirapalli, upheld the judgment-debtor's objection and dismissed the application as not maintainable. He held that the decree-holder cannot claim the amount of Rs. 5,421.46 by way of an application for payment out of the money in Court deposit. According to the learned Judge, the only remedy of the decree-holder was to file a suit for that amount, obtain a decree therein and attach the amount in Court deposit.

2. This revision has been brought against the order of the learned Subordinate Judge. I am clear in my mind that the learned Judge was in error in holding that the application for payment out of Rs. 5,421.46 did not lie. I agree with the submission of Mr. T. R. Mani, learned counsel for the Bank, that the provisions found in Order 34, rule 10 of the Code of Civil Procedure, are especially fashioned to provide for a proceeding of this kind. This provision is concerned with how a final adjustment has to be arrived at for determining the amount payable to a mortgagee in a suit for foreclosure, sale or redemption of mortgage. The provision is to the effect that over and above the amount for which the preliminary mortgage decree has been passed, the Court should add to that amount the costs of the mortgagee other than suit costs, as well charges and expenses which the mortgagee has properly incurred since the date of the preliminary decree and upto the date of actual payment.

3. A reference to the terms of Order 34, rule 10 brings out more than one significant feature of that provision. In the first place, it lays down an exception to the general rule in execution that a decree-holder is unalterably fixed to the amount decreed provided for in the suit. Indeed, this provision enables the mortgagee to claim, over and above the amount decreed under the preliminary mortgage decree, certain further sums of money. These additional sums are of a kind which could not possibly have entered into the reckoning in the preliminary decree, for the simple reason that they relate to costs, charges and expenses incurred by the mortgagee as mortgagee subsequent to the passing of the preliminary decree. In this sense, the provision takes particular note, in execution proceedings, of claims accruing subsequent to the decree. Mark the use of the phrase, "since the date of the preliminary decree" in Order 34, rule 10.

4. The second significant feature of this provision is that where a claim is made under this rule in proceedings in execution of a mortgage decree, the executing Court has no choice in the matter excepting to entertain the mortgagee's claim and to proceed to determine it. And, if on inquiry, the Court finds that the claim relates to costs, charges and expenses which had been "properly incurred" by the mortgagee subsequent to the preliminary decree, then the Court has got to add those amounts also, as a matter of final adjustment of the amount to be paid to the mortgagee. The Court has no discretion or option in the matter, either to entertain the claim and deal with it in the execution proceedings, or to refer the mortgagee to an independent suit for the purpose. The Court, on the contrary, is under a mandatory duty to add these post-decree costs, charges and expenses in the very processes of execution of the mortgage-decree. Mark the use of the word "shall".

5. There is yet another peculiar feature of Order 34, rule 10. The mortgagee, it would seem, can go on seeking the aid of the executing Court for recovery of his post-decree claims against the mortgagor till the amount, as finally adjusted, is paid to the last pie. Mark the

use of the word "upto the time of actual payment."

6. Order 34, rule 10 of the Code, may be described, more or less, as a procedural echo of section 72 of the Transfer of Property Act, 1882. This provision enables a mortgagee to spend money for the preservation of the mortgage property, for supporting the title both of the mortgagor and himself and for renewal of the lease where the mortgage is of a leasehold. The money so expended is declared by this provision to form part of the mortgage debt, recoverable as such by the mortgagee from the mortgagor, unless the contract otherwise provides. The expenses incurred by a mortgagee to preserve the hypetheca cannot, in reason, include payments made by him for insuring the property against loss or damage, since insurance does not protect the property insured, but only covers certain risks and indemnifes the insurer in case of loss or damage. Hence, section 72 makes a separate, but similar, provision relating to insurance premia paid by he mortgagee. Under the section, these payments towards insurance also are amenable to be incorporated in the mortgage debt and recoverable as such by the mortgagee.

7. Order 21, rule 10 of the Code, does not, in terms, refer to section 72 of the Transfer of Property Act, while referring to the amounts which a mortgagee is entitled to consolidate under section 72 with the mortgage money. The rule refers generally, and without exception, to all costs, charges and expenses incurred by the mortgagee, their only qualification being that they must have been "properly" incurred. This epithet might cover the several items of expenditure provided for by section 72 of the Transfer of Property Act; but it is wide enough to include also other costs, charges and expenses properly incurred by the mortgagee, although they do not strictly fall within the ambit of section 72.

8. The whole idea behind Order 34, rule 10 seems to be not only to deal with the execution of mortgage decrees as *sui generis*, but to avoid a multiplicity of proceedings between the mortgagee and the mortgagor as respects the same subject-matter. The provision certainly makes for a quick and easy-free remedy to the mortgagee. But it is also a convenient proceeding both for the parties to the mortgage suit and for the Court itself. It is quite conceivable that already at the trial of the mortgage suit, materials might have been brought on record by either party, some of which might well form the very basis of the mortgagee's subsequent claim before the executing Court for reimbursement of post-decree costs, charges and expenses. In any case, the executing Court cannot shy at an inquiry into the mortgagee's subsequent claims since the whole object of Order 21, rule 10 is that the mortgagee's dues must obtain a final adjustment once and for all, in the very suit and its follow-up execution proceedings. With a provision such as this, and a mandatory provision at that, I must hold that a separate suit not only does not lie, but it would be no good to anybody in this world-parties, counsel and Court included if it does lie at all.

9. Learned counsel in this case did not dispute the nature of the present claim made by the Bank in execution. He only urged that the claim has to be enforced against his client only by way of an independent suit For the reasons I have earlier mentioned however, this contention must be rejected.

10. Learned counsel referred me to a ruling of a Bench of the Allahabad High Court reported in *Dambar Singh* v. *Kallyan Singh*[1]. That case had to deal with the application of Order 34, rule 10 of the Code, before its amendment by Act XXI of 1929. The Court expressed the view that under these provisions nothing could be added to the mortgage decree excepting costs of the execution proceedings. This decision had to do with Order 34, rule 10 of the Code, as it stood prior to its amendment by Act XXI of 1929. But, there is a subsequent decision by a Full Bench of the same High Court, which takes a comprehensive view of the provision as it now stands after the amendment in 1929. The Full Bench ruling is reported in *Uttam Kunwar* v. *Krishna Pal Singh*[2]. This Full Bench decision is authority for two positions. In the first place, it was held by the Full Bench that Order 34, rule 10 covered not only the items of expenditure mentioned in

1. (1922) 20 All. L. J. 170.
2. A. I. R. 1960 All. 659.

section 72 of the Transfer of Property Act, but it also covered other costs, charges, and expenses incurred for purposes analogous to those mentioned in section 72. The second position laid down by the Full Bench was that under Order 34, rule 11, the mortgagee can claim amounts which were not included either in the preliminary mortgage decree or even under the final decree.

11. Both on the terms of Order 34, rule 10 and on the authorities, the Court below erred in dismissing the Bank's application for payment cut. The said order is accordingly set aside. The Bank's application in E. A. No. 330 of 1978 stands allowed. The revision is allowed on the above terms. There will, however, be no order as to costs.

12. This petition having been set down this day, for 'being mentioned' in the presence of Mr. T. R. Mani, Advocate for the petitioner and of Mr. C. Chinnasami, Advocate for the respondent, the Court made the following order:—

I had disposed of the above revision on 28th October, 1980.

13. I posted the revision again for further elucidation and clarification as respects the break-up figures contained in the Bank's application for payment cut in the lower Court.

14. In their application for payment out the Bank had asked for payment out of Rs. 5,421,46. being the aggregate amount of insurance premia paid by the Bank in respect of the mortgaged property, and for which they claimed reimbursement. In seems that more than one premium had made up the amount of Rs. 5,421.46.

15. The argument of the learned counsel in the revision, which was based on the provisions of Order 34, rule 10 of the Code of Civil Procedure covered the whole of the said amount of Rs. 5,421.46. A reference to the record as well as the Order under revision reveals the amounts and dates of payment by the Bank of the insurance premia. The details are as under:

Insurance Premia. Rs.		*Date of payment*
1,598.82.		20-8-1974
1,598.82.		21-8-1975
1,598.82.		27-7-1976
625.00.		30-8-1977
5,421.46	Total	

16. The above table shows that the first two payments of Rs. 1,598.82 each were made, before the passing of the preliminary decree in the suit. In my order dated 28th October, 1980, in this revision, I held that the provisions of Order 34, rule 10, Civil Procedure Code, under which the Bank had based its claim in the present proceedings refers only to costs, charges and expenses properly incurred by the mortgagee *subsequent* to the date of the preliminary decree. This means, they cannot relate to costs, charges and expenses incurred prior to that date. It follows, therefore, that the two payments made on 20th August, 1974 and 21st August, 1975, are not eligible. for being claimed by the mortgagee in the present proceedings under Order 34, rule 10 of the Code of Civil Procedure. However, the Bank would be entitled to have its claim for the two subsequent payments of Rs. 1,598.82 and Rs. 625/- made on 27th July, 1976 and 30th August, 1977, respectively.

17. Since these materials are already on record and are disclosed by the very order of the Court below, there is no need to ask that Court to determine the amount. Hence in clarification of my order dated 28th October, 1980, in this revision, it is hereby ordered that sums of Rs. 1,598.82. and Rs. 625 aggregating to Rs. 2223.82 shall be paid out to the plaintiff Bank from out of the amount of money in deposit in the lower Court.

18. Mr. Mani, learned counsel for the Bank, submitted that in view of the decision to limit the claim of the Bank under Order 34, rule 10, Civil Procedure Code, only to the two

post-decree payments of Rs. 1,598.82 and Rs. 625 the remedy of the bank for reimbursement and realisation of the two earlier payments towards the insurance permia may be left open to be pursued in appropriate proceedings.

19. Learned counsel even suggested that I might indicate the lines on which the Bank might pursue its remedy in regard to these expenditure. I am, however, not willing to be drawn into a discussion as to what would be the appropriate remedy open to the Bank in respect of the other two amounts of Rs. 1,598.82 each. I would content myself by saying that the Bank would be at liberty to take such proceedings as it may be advised and which are open to it according to law for the realisation of the said amounts. I make it quite clear once again that the plaintiff mortgagee Bank would be entitled to payment out only of the sum of Rs. 2,223.82.

Let this order be read as part and parcel of my order dated 28th October, 1980, in this revision.

R. S. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. B. N. Singh, C.J.* and *S. Padmanabhan, J.*

Union of India, represented by the Secretary to Government of India, Ministry of Finance, New Delhi and others

... *Appellants**

v.

M/s. Indo-French Pharmaceutical Company by Mrs. J. M. R. Fernandes, Managing Partner ... *Respondent.*

Central Excises and Salt Act (I of 1944), item 14-E of the First Schedule and Explanation I *—Scope and applicability.*

The respondent was a manufacturer of pharmaceutical products, some of which were liable for excise duty, and others not. The respondent had admittedly taken out a licence for the manufacture of those pharmaceutical productions in respect of which they were bound to pay excise duty. They manufactured three Indian Pharmacopoes products, *viz.,* (1) Sulphagunidire Tablets, (2) Sulpha Dimidine Tablets, and (3) Calcium Gluconate Tablets. These items had been classified as non-excisable, and the respondent had been clearing the items without payment of excise duty with the approval of the Central Excise Authority. While so, on 2nd February, 1971, the third appellant called upon the respondent to show cause why duty should not be levied on the said preparations from 19th October, 1966 to 9th April, 1970, and why a penalty should not be levied. The respondent contended that these items were not execisable, and consequently no duty was liable to be paid. However, the third appellant ultimately levied a sum of Rs. 11,379.90 by way of excise duty. The respondent having exhausted all the statutory remedies filed a writ petition which was allowed by a single Judge.

*W. A. No. 52 of 1978. *4th November, 1982.*

On appeal,

Held: The label used by the respondent contains the name of the products as per the India Pharmacopoea, and it also contains the name of the respondent-manufacturers. The label shows in bold letters that it is a poison. It also contains the Schedule H Drug warning. Above all the label contains a symbol with the words superscribed "Indo-French". The symbol is a very small one and appears to be very insignificant when compared to the over-all size of the label. [*Para*. 3.]

The symbol used by the respondent cannot be said to be distinctive enough to attract item 14-E of the First Schedule read with *Explanation I* Central Excise and Salt Act. It is also admitted that the said symbol or mark is not the registered trade mark of the respondent. It is equally admitted that this mark is being used by the respondent in respect of all their preparations. There is absolutely nothing in the mark to indicate a connection in the course of trade between the medicine and the respondent. The items concerned were therefore not excisable. [*Para*. 7.]

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice Ramanujam, dated 20th July, 1977, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2967 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records in Order No. 1843, dated 8th December, 1972, of the first respondent and in A. No. 202 of 1971 dated 3rd, June, 1971 of the 2nd respondent and quash the said orders of being unjust, illegal arbitrary, unreasonable without jurisdiction and vitiated by patent error on the face of records and by denial of natural justice.

K. N. Balasubramanian, Additional Central Government Standing Counsel, on behalf of Appellants.

K. P. Jagadeesan, for Respondent.

The Order of the Court was made by

Padmanabhan, J.—This Writ Appeal has been filed by the Union of India against the order of a learned Single Judge of this Court in Writ Petition No. 2967 of 1973.

2. The question to be decided in the writ appeal centres round the fact whether the respondent Messrs. Indo-French Pharmaceutical Company can be said tohave used a mark, symbol, monogram or label in marketing its medicinal preparations. The respondent is a manufacturer of pharmaceutical products, some of which are liable to excise duty, and others not. The respondent has admittedly taken out a licence for the manufacture of those pharmaceutical productions in respect of which they are bound to pay excise duty. They manufactured three Indian,' Pharmacopea products. *viz*., (1) Sulphaguanidire Tablets (2), Sulpha Dimidine Tablets ,and (3) Calcium Gluconate Tablets. These items had been classified as non-excisable, and the respondent has been clearing the items without payment of excise duty with the approval of the Central Excise Authorities. While so, on 2nd February, 1971, the third appellant called upon the respondent to show cause why duty should not be levied on the said three preparations from 19th September, 1966, to 9th April, 1970, and why a penalty should not be levied. The respondent contended that these items were not excisable, and consequently no duty was liable to be paid. However, the third appellant ultimately levied a sum of Rs. 11,319.90 by way of excise duty. The respondent, having exhausted all the statutory remedies, filed a writ petition which was allowed by a learned single Judge.

3. The label used by the respondent contains the name of the products, as per the India Pharmacopoea, and it also contains the name of the respondent as manufacturers. The label shows in bold letters that it is poison. It also contains the Schedule H Drug warning. Above all this, the label contains a symbol with the words superscribed "Indo French". The symbol is a very small one and appears be very insignificant when compared to the over all size of the label.

4. The contention of Mr. K. N. Balasubramanian, the learned Additional Central Government Standing Counsel, is that since the medicine bears on itself or its container the monogram or a symbol to indicate the connection between the medicine and the manufacturer, it will attract excise duty on the item under item 14-E of the First Schedule to the Central Excise and Salt Act read with the *Explanation* I thereof. The question is how far this contention can be sustained.

Item 14-E reads as follows :

"Patent or proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those medicines which are exclusively ayurvedic, unani, sidha or homoepathic. Sixty per cent. *ad valorem.*

Explanation I.—"Patent or proprietary medicines" means any drugs or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in, human beings or animals which bears either on itself or on its container or both, a name which is not specified in a monograph in a pharmacopoea, formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (XLIII of 1958), or any other mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to the medicine for the purpose of indicating or so as to indicate connection in the course of trade between the medicine and some person having the right either as proprietor or otherwise to use the name or mark with or without say indication of the identity of that person".

It is admitted that the three products manufactured by the respondent are Indian Pharmacopoeia products. In the explanation, these products will become patent and proprietary medicines only if a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person having the right either as proprietor or other wise to use the name or mark. In other words, if a manufacturer uses a word, symbol, label or monogram, apart from a monograph in a pharmacopoeia, formulary or other publications, that could be treated as indicating that the manufacturer has a proprietary interest in the medicine manufactured by him. The symbol used by the respondent cannot be described as a monogram. In "The Concise Oxford Dictionary" (Sixth Edition), the meaning of "monogram" is given thus: "Two or more letters, especially person's initials, interwoven as device". In view of "this meaning of the word "monogram"., the learned Standing Counsel contended that it might be taken to be symbol and even then these products would become patent or proprietary medicines under *Explanation I* to Item 14-E. We are unable to accept the contention of the learned Standing Counsel. In order to attract the *Explanation I* to Item 14-E, the symbol must indicate a connection in the course of trade between the medicine and some person having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person. The label itself containes the name of the respondent in full as "Indo-French Manufacturing Company (Private) Limited, Nanganallur, Madras-61". The symbol, as already stated is a small rectangle with a flame and the words "Indo-French" superadded. The symbol itself cannot be said to be intended to indicate a connection in the course of trade between medicine and the respondent. Further, it is so insignificant in appearance compared to the over-all size of the label that an ordinary prudent and reasonable man is not likely to draw any connection between the respondent and the medicine in the course of the trade.

5. The learned Standing Counsel drew our attention to two decisions of this Court, one in *The Collector of Central Excise, Madras* v. *A. P. Basava Prabhu, Proprietor, M/s. T. C. Magalingappa and Company, Madras*[1] and the other in *Suseela* v. *The Assistant Collector of Central Excise, Integrated Division, Madras*[2]. The preparation that was the subjectmatter of consideration before the Bench in W A. No. 23 of 1964 was Eucalyptus oil. In that case, the bottle marketed by M/s. Nagalingappa and Company contained, besides the words "Nilgiri Thailam" in Tamil, the photograph, signature and name or initials of the manufacturing company. These features were taken by the learned Judges to be distinctive features, and by these

1. W. A. No. 23 of 1964.
2. W. P. No. 1477 of 1966.

distinctive features, a connection was sought to be established in the course of trade between the company and the eucalyptus oil. We are of the view that the facts of the case with which the Bench were concerned were entirely different. In view of the presence of the photograph, signature and name and the initials of the manufacturer, the learned Judges, we may say so with respect, came to the right conclusion that the manufacturer used a distinctive mark or symbol to connect the medicinal preparations with the company in the course of the trade.

6. In W. P. No. 1477 of 1966, the learned Judge was again concerned with eucalyptus oil. In that case, the manufacturer bottled the product and put it in cardboard cartons. The cartons contained a picture of a child with the following particulars among others "Vistone oil of Eucalyptus (I. P.). Per cold, headache and pains-Repacked-Dentone Chemical Works No. 13, Kondi Chetty Street, Madras-1". It also contained an indication that it was a medicine or "Oushadam" for curing cold, headache and pains. In the light of these facts, the learned Judge followed the decision in Writ Appeal No. 23 of 1964 and held that the product was liable to excise duty. We are of the opinion that the facts before the learned Judge were entirely different from the facts in this case.

7. To conclude, we agree with the learned single Judge that the symbol used by the respondent cannot be said to be distinctive enough to attract item 14-E read with *Explanation I* of the First Schedule to the Central Excise and Salt Act. It is also admitted that the said symbol or mark is not the registered trade mark of the respondent. It is equally admitted that this mark is being used by the respondent in respect of all their preparations. There is absolutely nothing in the mark to indicate a connection in the course of trade between the medicine and the respondent. We therefore, confirm the order of the learned Single Judge and dismiss the appeal. There will, however, be no order as to costs.

R S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

The Authorised Officer (Land Reforms), Erode ... *Petitioner**

v.

M. Ramaswamy Gounder and others ... *Respondents*

(A) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), as amended by Act (XVII of 1970), section 22—Scope and applicability—Two sales by conveyance on 15th May, 1970—Sales preceded by agreement of sale of 4th February, 1970—Date of commencement of the Act 15th February, 1970—Notified date 2nd October, 1970—Sales whether effected to defeat the provisions of the Act.*

(B) *Transfer of Property Act (IV of 1882), section 53-A—Doctrine of part-performance—Agreement of sale entered into on 4th February, 1970—Sales effected on 15th May, 1970—Section 22 of the Tamil Nadu Land Ceiling Act—Encompasses transactions which fall within 15th February, 1970 to 2nd October, 1970—The instant sales cannot be considered as void by reason of section 53-A, Transfer of Property Act.*

(C) *Interpretation of Statutes— Special overriding the general—Both must deal with the same subject-matter.*

In this case section 22 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, was invoked to avoid two transactions of sale of land. The two sales by conveyance in the present case took place under two sale deeds dated 15th May, 1970. They were registered by the Sub-Registrar on 23rd May, 1970. The Authorised Officer held that the two sales had been effected by the land-ower with intent to defeat the provisions of the

*C. R. P. Nos. 2243, 2244 and 2245 of 1979.
23rd October, 1981.

Act. On appeal the Tribunal found that the two sales were preceded by an agreement of sale and therefore the two sales were genuine transactions and not sham and nominal. On revision,

Held: The total effect of section 53-A is to effectuate a transfer as fully and as completely as if a coveyance had been effected although all that the parties have is a mere agreement in writing for the transfer of property followed by delivery of possession and a willingness on the part of the parties to complete the transaction. In the present case, the evidence on record shows that the agreement was in writing on stamp paper, that it contained the details of the terms of conveyance including consideration, the advance received, the price of the lands to be conveyed and the time for completion of the transaction. The record also contains the materials to show that closely following on the heels of the agreement in writing, possession was handed over by the landlord to the purchasers. What is more, subsequently, as contemplated in the agreement of sale, regular conveyances were executed in which specific mention was made of the precedent agreement of sale dated 4th February, 1970, and the sale transaction was completed by payment of the balance of the purchase price. The present is a case to which the provisions of section 53-A of the Transfer of Property Act fit to perfection. The result is that is point of law the lands must be held to have been transferred on 4th February, 1970 or, at the latest, when possession had been handed over pursuant to the agreement. It is not suggested that either of these events happened within the crucial period, namely, between 15th February, 1970, which represents the date of commencement of the Act and the notified date respectively. Hence section 22 which encompasses transactions, which fall within this period, and not outside, cannot apply to the two sales in question in the present case so as to render them void. [*Para.* 6.]

Section 22 deals not with mere documents but with substantial transactions of sale, gift and the like. Under the general law a sale can be effectuated and can become complete either by a registered conveyance or, short of that, under the provisions of section 53-A of the Transfer of Property Act. Section 22 of the Tamil Nadu Act LIII of 1981 as subsequently amended deals deals not so much with documents or parchments as with real transactions recognisable by law as such. Hence it stands to reason that the transaction of sale dealt with by that section must include not merely a regular registered sale by conveyance, but also a sale which is equally effective under the provisions of section 53-A of the Transfer of Property Act. [*Para.* 8.]

The familiar doctrine of the special overriding the general can apply only in a case where both deal with the same subject-matter. If apart from the Transfer of Property Act, which is a general enactment there is either a local or special enactment dealing with transfer of property, as such, then this doctrine can apply and the special can be regarded as overriding the general. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act can by no means be regarded as a special enactment devoted for the fixation of ceiling on agricultural holdings. It may be that section 22 was enacted as an ancillary provision intended to be an anti-avoidance measure. But that will not render the conceptions to be found in that section as having something of a special meaning different altogether from the meaning the law assigns to them under the general law. [*Para.* 9.]

Cases referred to:—

Naganatha Ayyar v. *Authorised Ocffier*, (1971) 84 L. W. 69 ; *Authorised Officer* v. *Naganatha Ayyar*, (1979) 3 S. C. C. 466 : A. I. R. 1979 S. C. 1487 : (1980) 1 M. L. J. (S. C.) 34.

Petition under section 83 of Act LXVIII of 1961 as amended Act of XVII of 1970, praying the High Court to revise the decree of the Court of the Subordinate Judge of Erode, dated 5th April, 1976, and passed in C M A. Nos. 56, 61 and 63 of 1975. (Ref. 32 R/MAI/17/70 dated 25th September, 1974, the Authorised Officer (Land Reforms), Erode.

G. Jeremiah, for Additional Government Pleader, for Petitioner.

K. Ramamurthy and *N. S. Nandakumar*, for Respondents.

The Court made the following

ORDER.—These revisions arise out of proceedings started by the Authorised Officer under section 22 of the Act LVIII of 1961, Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 as amended by Act XVII of 1970. The Act was passed to provide for the fixation of ceiling on agricultural landholdings and for certain other matters connected therewith. Section 22 of the Act may be characterised as an anti-evidence provision. Under this section any transfer made by any person of land held by him by sale or otherwise on or after the commencement of the Act, but before the notified date, may be declared to be void by the Authorised Officer if he finds that the transfer by sale defeats any of the provisions of the Act. This section was invoked by the Authorised Officer in the present case in order to avoid two transactions of sale of land by the respondent N. Ramaswamy Gounder one of the extent of 1.95 acres and the other of an extent of 5.82½ acres. It may be observed that the date of commencement of the Act was 15th February, 1970 and the notified date was 2nd October, 1970. The two sales by conveyance in the present case took place under two sale deeds dated 15th May, 1970. They were registered with the Sub-Registrar of Assurance on 23rd May, 1970. The Authorised Officer held that the two sales had been effected by the land-owner, Ramaswamy Gounder with intent to defeat the provisions of the Act. On appeal, the Land Tribunal went into all the surrounding facts and circumstances and recorded its findings. The Tribunal found that the sale deeds were preceded by an agreement of sale between the respondent and the purchasers. The stamp paper for the agreement had been purchased in the name of one of the purchasers and the agreement bore the date 4th February, 1970. The Tribunal found that under the agreement the total consideration for the two sales amounted to Rs. 19,000 and as between them the purchasers had paid a total advance of Rs. 3,500. The Tribunal further found that on the execution of the agreement of sale and the receipt of advance, the respondent-land-owner delivered possession of the lands to the purchasers. The Tribunal, referred to the documentary evidence in the case which showed that delivery of possession had been effected to the purchasers. Reference was made to transfer of patta, entries in the chitta, and the like. That the possession had already been handed over and remained with the purchasers was also found from the fact that with respect to a portion of the land one of the purchasers was recognised as the claimant in certain land acquisition proceedings and appropriate compensation was paid to him. Having regard to all these material facts, the Tribunal recorded a finding to the effect that the two sales effected by the land-owner were genuine transactions and not sham and nominal. The Tribunal also rendered a finding to the effect that they were not intended to defeat the provisions of the Act. The Tribunal accordingly reversed the decision of the Authorised Officer and held that the two sale deeds were not void under section 22 of the Act.

2. In these three revisions brought at the instance of the Authorised Officer the one and only point raised is whether the sales effected under the two transactions in questions are hit by section 22 of the Act and whether the Tribunal was right in reversing the order passed by the Authorised Officer holding the transactions to be void under section 22 of the Act.

3. I have earlier set out the gist of the provisions of section 22 of the Act. Whil holding that the section did not apply to the present case, the Land Tribunal had mad reference to a decision of this Court in *Naganatha Ayyar* v. *Authorised Officer*[1]. The learned Government Pleader in the forefront of his argument submitted that this decision of our Court had been reversed in appeal by the Supreme Court in *Authorised Officer* v. *Naganatha Ayyar*[2]. Analysing section 22 of the Act, the Supreme Court observed that for this section to apply, three requirements must be satisfied: (*i*) There must be a transfer or other alienation; (*ii*) The transfer must have taken place in between the date of commencement of the Act and the notified date; and (*iii*) The object of the transaction must be found to be to defeat one or other provisions of the Act. The Supreme Court held that the Authorised

1. (1971) 84 L. W. 69.
2. (1979) 3 S. C C. 466: A. I. R. 1979 S. C. 1487: (1980) 1 M. L. J. (S. C.) 34.

Officer must void the transfer if these three elements were present in any given transfer. According to the Supreme Court, apart from these elements, there is no room for importing a fourth principle to the effect that transfer to be avoided should be sham or that it should be nominal or bogus. The Supreme Court further observed that if a transfer defeats the provisions of the Act, it would fall under section 22 even though it might be regarded as having been effected by the vendor for family necessity or for any other *bona fide* reason.

4. Standing four-square on this decision of the Supreme Court, the learned Government Pleader submitted that the conclusion of the Tribunal in the present case must be set aside and the order of the Authorised Officer restored on the findings rendered by the Tribunal. Mr. Nandakumar, learned counsel for the respondent-landowner, however, sought to support the decision of the Tribunal, inviting a different approach to the facts found. Learned counsel submitted that quite apart from everything else in this case, the fact remained that the two transactions had been completed on 4th February, 1970, although the formal conveyance happended to have been executed on 15th May, 1970. Learned counsel pointed out that the landowner and the purchasers had entered into an agreement for sale in writing to early as 4th February, 1970, under which the purchasers had paid a portion of the consideration in advance and had obtained delivery of possession of the lands in question. Learned counsel submitted that the course of transactions carried out in this manner constituted a classic case of transfer by part-performance of the contract for which the law has made appropriate provision in section 53-A of the Transfer of Property Act, 1882. Learned counsel pointed out that the evidence relating to the agreement in writing, the receipt of advance of purchase price, and the take-over of possession by the purchasers are all matters of record and their truth could not be questioned in these revisions. Learned counsel granted that the agreement of sale had not been registered but that, under the law, was not necessary for the purpose of invoking the doctrine of part performance embodied in section 53-A of the Transfer of Property Act.

5. I think, I must accept the force of the submissions made by learned counsel for the respondent on the basis of section 53-A of the Transfer of Property Act. This section in the Transfer of Property Act provides that where any person contracts to transfer for consideration, any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has, in part performance of the contract, taken possession of the property and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract has not been registered in the manner prescribed therefor by the law, the transferor or any person claiming under him shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession. There is a proviso to this section which says that the rights conferred on the transferee under this section shall be without prejudice to the rights of a subsequent *bona fide* transferee for value without notice.

6. The total effect of section 53-A is to effectuate a transfer as fully and as completely as if a conveyance had been effected although all that the parties have is a mere agreement in writing for the transfer of property followed by delivery of possession and a willingness on the part of the parties to complete the transaction. In the present case, the evidence on record shows that the agreement was in writing on stamp paper, that it contained the details of the terms of the conveyance including the consideration, the advance received, the price of the lands to be conveyed and the time for completion of the transaction. The record also contains the materials to show that closely following on the heels of the agreement in writing, possession was handed over by the landowner to the purchasers. What is more, subsequently, as contemplated in the agreement of sale, regular conveyance were executed in which specific mention was made of the precedent agreement of sale dated 4th February, 1970, and the sale transaction was completed by payment of the balance of the purchase price.

Having regard to all these facts which have been adverted to in the order of the Tribunal, I am satisfied that this is a case to which the provisions of section 53-A of the Transfer of Property Act fit to perfection. The result is that in point of law the lands must be held to have been transferred on 4th February, 1970, or, at the latest, when possession had been handed over pursuant to the agreement. It is not suggested that either of these events happened within the crucial period, namely, between 15th February, 1970 and 2rd October, 1970 which represent the dates of commencement of the Act and the notified date respectively. It follows, therefore, that section 22 which encompasses transactions, which fall within this period, and not outside, cannot apply to the two sales in question in the present case so as to render them void.

7. The learned Government Pleader urged that the mere execution of the agreement of sale does not confer title on the transferee. The learned Government Pleader is in a sense right in urging this pure conception of the property law of India. In our country, we do not have such a thing as an equitable title which a transferee under an agreement for transfer of immoveable property acquires merely on the execution of that agreement in his favour. Our law knows no such thing as the transfer of an equitable title. A transferee under an agreement of sale may have, in certain circumstances, a right to sue for specific performance of the contract of sale against the other party. But what he possesses is by no means a title or interest in the land in question call it equitable or call it by any other name. All this is not, however, to say that section 53-A of the Transfer of Property Act does not bring about a transfer of the property in the truest sense of that expression. If the section does not bring about that result, it has no business to have a place in the Transfer of Property Act at all.

8. The learned Government Pleader then referred to the language of section 22 of the Act and said that the subjectmatter of proceedings by the Authorised Officer under that section are transfers by sale, gift, exchange surrender, settlement and the like in all of which there is an element of passing of title from one person to another. His point was that even in a case where section 53-A of the Transfer of Property Act can properly be applied, the kind of situation brought about by that provision cannot be brought within the expression 'sale', 'exchange', and the like since what is contemplated under section 22 are full-fledged transfers by way of sale effected by a valid conveyance and other kinds of transfers completed under the law after observing all formalities to the fullest extent, I do not accept this contention as well-founded on the terminology of section 22. The section deals not with the mere documents, but with substantial transactions of sale, gift and the like. Under the general law a sale can be effectuated and can become complete either by a registered conveyance, or, short of that, under the provisions of section 53-A of the Transfer of Property Act. Section 22 of Tamil Nadu Act LIII of 1961, as subsequently amended, deals not so much with documents or parchments, as with real transactions recognizable by law as such. Therefore, it stands to reason that the transaction of sale dealt with by that section must include not merely a regular registered sale by conveyance, but also a sale which is as equally effective under the provisions of section 53-A of the Transfer of Property Act.

9. The learned Government Pleader submitted that the Act being a special enactment must override the provisions of a general enactment such as the Transfer of Property Act. This familiar doctrine of the special overriding the general can only be applied in a case where both deal with the same subject-matter. If, apart from the Transfer of Property Act, which is a general enactment there is either a local or special enactment dealing with transfer of property, as such, then this doctrine can properly be applied and the special can be regarded as overriding the general. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act can by no means be regarded as a special enactment devoted to transfer of property. It is, on the contrary, an Act to provide for the fixation of ceiling on agricultural holdings. It may be that section 22 was enacted as an ancillary provision intended to

be an anti-avoidance measure. But that will not render the conceptions to be found in that section as having something of a special meaning different altogether from the meaning the law assigns to them. The expression 'sale', 'transfer', exchange', settlement and the like which occur in section 22 of that Act must bear the same meaning as the law assigns to them under the general law. In no other terms can that section work. It is intended to avoid regular transfers of this kind. If we give a special meaning to those transfers, the danger is that ordinary transfers which are avoidance transactions cannot be brought within the net of section 22. How the present transfer gets out of section 22 is because under the general law the sale must be regarded as having been completed long before the formal conveyance had been executed and got registered by the parties.

10. Having regard to the considerations I have set out in the foregoing paragraphs I am satisfied that the conclusion of the Tribunal was right, although for the quite different reason I have given on the contentions urged before me at the bar. The result is that the civil revision petitions are dismissed. In the circumstances of the case there will be no order as to costs.

R. S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan J.*

A. M. S. Paramasiva Mudaliar ... *Petitioner**

v.

A. M. S. Munirathina Mudaliar and another ... *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint sought—Suit for recovery of possession and other reliefs on the basis of a release deed—Petition for amending plaint to add alternative plea of claim of money value of property—Amendment allowed.

The plaintiff and the first defendent were brothers. The plaintiff sued the first defendant in O. S. No. 264 of 1976, Additional Sub-Court, Vellore for recovery of possession and other reliefs on foot of a release deed dated 19th June, 1967. In an earlier proceeding between the parties the appellate Court had upheld the release deed and also held that it did not require registration since the immovable property dealt with therein formed part of partnership assets and the adjustment embodied in the release deed must be treated as dealing only with the partnership assets, whether immovable or movable. According to the release deed the suit property formed an integral part of the adjustment between the parties and fell to the share of the plaintiff. The property was evaluated at Rs. 26,875.47 and together with interest at 12 per cent per annum from date of evaluation to date of payment came to Rs. 35,000/-as a whole payable by the first defendant and his transferee the second defendant. The plaintiff had originally claimed the suit property in O. S. No. 264 of 1976, but subsequently filed an amendment petition to amend the plaint by raising the alternative plea of a money claim for the abovesaid amount. The first defendant-respondent contended *inter alia* that a suit based on title cannot be converted into one for movable property and that the cause of action will be altered if the amendment was

*C. R. P. No. 3960 of 1981. *25th June*, 1982.

allowed. The lower Court rejected the petition for amendment of the plaint holding that it tended to introduce a new cause of action and the claim was barred by limitation. In revision,

Held, the plaintiff bases his claim purely on the release deed, dated 19th June, 1967. The amendment now sought for basically rests upon the release deed. Inasmuch as the respondents herein are taking inconsistent pleas whan what they were advancing in the previous suit, the petitioner herein, in order to get his share of the amount of the assets either as immovable property or as the money equivalent thereof, as provided in the release deed, wants to have the plaint amended. According to the petitioner, the immovable property was allotted to him in the release deed, which is a settlement between the partners *viz.*, the petitioner and the first respondent herein. Order 6, rule 17 of the Code of Civil Procedure is wide enough to take in the amendment of the present nature. The Court below has failed to exercise the discretion vested in it by law and in the interests of justice, the amendment has to be allowed on the facts and circumstances of the present case. [*Paras.* 8 and 9.]

Cases referred to:—

K. Nagutha Mohamed Nainar v. *Vedavalli, Ammal*, (1959) 1 M. L. J. 307 ; *L. J Leach and Company Limited* v. *M/s Jardies Skinner and Company*, 1957 S. C. J. 313 : (1957) S. C. R. 438 : A. I. R. 1957 S. C. 357.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the II Additional Subordinate Judge, Vellore, dated 27th October, 1981 and made in I. A. No. 1336 of 1981 in O. S. No. 264 of 1976.

T. R. Rajagopalan, for Petitioner.

K. N. Balasubramaniam, for Respondent No. 1.

T. S. Sethuraman, V. M. Muthukumar and *K. Jagannaha Rao*, for Respondent No. 2.

The Court made the following

ORDER :—The petitioner, plaintiff in I. A No. 1336 of 1981 in O. S. No. 264 of 1976 on the file of the Subordinate Judge, Vellore, is the revision petitioner. He filed the above suit for recovery of possession of the suit property and for other reliefs on the basis of a release deed, dated 19th June, 1967, executed between him and his brother, the first defendant herein. In the previous proceedings between the plaintiff and the first defendant herein, the appellate court in A. S. Nos 199 and 234 of 1974 upheld the release deed, dated 19th June, 1967 and also held that it did not require registration on the ground that the immovable properties dealt with therein were only partnership assets and the adjustment embodied in the release deed must be treated as dealing with the partnership assets, whether moveable or immoveable. According to the release deed, the suit property formed an integral part of the adjustment between the partners and the suit property fell to the share of the plaintiff herein. The property was evaluated at Rs. 26,875.47 together with interest at 12 per cent per annum from the date of the evaluation till date of payment of Rs. 35,000 as a whole has to be paid by the first defendant and his transferee, the second defendant herein. Originally, the plaintiff claimed the moveable property and subsequently an amendment petition I. A. No. 1336 of 1981 in O. S. No. 264 of 1976 was filed to amend the plaint by raising the alternative plea of claiming the abovesaid amount.

2. The first respondent herein filed a counter stating that the suit property is not a partnership property, that it was not the joint family property of this respondent and his sons that the title to the suit property cannot pass to the petitioner / plaintiff unless there is a registered document in his favour as the property is admitted over Rs. 100 in value, that the suit based on title cannot be converted into one for recovery of moveable, that the cause of action will be altered if the amendment is allowed, that in any event, the period of limitation for the claim of money is only three years that as the petition is filed five years after the suit, the

claim is hopelessly barred by limitation and that the amendment sought for cannot be allowed at this belated stage.

3. The second respondent herein also filed a counter to the amendment petition stating that the petition is highly belated, that this respondent is in no way connected with the alleged release deed said to have been executed between the petitioner and the first respondent herein, that the immoveable property dealt with in the suit is not partnership asset and that in any event, the amendment petition has got be dismissed as hopelessly barred by limitation.

4. The lower Court, after holding that the petitioner introduces a new case by such amendment, that the claim is barred by limitation and that the same has to be dismissed, dismissed the petition without costs. It is against this order the present revision petition has been filed by the plaintiff.

5. The petitioner herein originally filed the suit for recovery of possession of the suit property and for recovery of a sum of Rs. 6,250 being the value of the machineries. The application is filed to amend the plaint for recovery of money as an alternative relief. The addition prayed for is as follows. Subsequent to paragraph 6, the petitioner wants to add the following as paragraph 6 (*a*) :

> "The plaintiff submits that if in any event notwithstanding the conclusive judgment in A. S. Nos. 199 and 234 of 1974 on the file of the Subordinate Judge of Vellore, dated 9th January, 1976, it is construed that the release deed, dated 19th June, 1967 and upheld by the appellate Court, does not confer title to the plaintiff to the suit property which has been held to be a partnership asset, then the plaintiff is entitled to be paid a sum of Rs. 26,875.47 together with interest at 12 per cent per annum from that date till date of payment of Rs. 35,000 as valued in the plaint and as admitted by the first defendent in O. S. No. 764 of 1969 on the file of the District Munsif of Vellore, together with interest at 12 per cent per annum from the date of the suit till date of the payment. To this the plaintiff is entitled as an alternative relief".

The petitioner herein further wants to add subsequent to plaint paragraph 14 the following as paragraph 14 (*a*):

> "After the word 'the plaintiff', or in the alternative directing the defendants to pay the plaintiff a sum of Rs. 26,875.47 together with interest at 12 per cent per annum from 19th June, 1967 till date of payment, or Rs. 35,000 together with interest at 12 per cent. per annum from the date of the suit till date of payment."

Consequential amendment has also been prayed for in the valuation paragraph.

6. Mr. T. R. Rajagopalan learned counsel for the petitioner submitted that there is no change in the original cause of action, that the prayer is consequential to the allotment in the release deed and that since the release deed can be acted upon, as held in the previous judgments, the prayer to amend has to be automatically allowed.

7. Mr. K. N. Balasubramaniam, learned counsel for the respondents herein submitted that by such amendment, the whole cause of action is changed and the prayer to get the money equivalent to the immoveable property is in short, a suit to recover an ascertained amount and that such a suit for recovery of money, which has been filed beyond the period of three years is hopelessly barred by limitation. According to the learned counsel such an amendment of the plaint will deprive the defendants of their valuable right of limitation and should not be allowed following the decision reported in *K. Nagutha Mohamed Nainar* v. *Vedavalli Ammal and others*[1].

8. I have carefully gone through the records in this case. The plaintiff bases his case purely on the release deed dated 19th June, 1967. The amendment now sought for basically rests upon the release deed. Inasmuch as the respondents herein are taking inconsistent pleas other than that they were advancing in the previously instituted suit, the petitioner herein, in order to get his share

1. (1959) 1 M. L. J. 307.

of the asset of the share either as immoveable property or as the money equivalent thereof as provided in the release deed, wants to have the plaint amended. According to the petitioner, the immoveable property was allotted to him in the release deed, which is a settlement between the partners *viz.*, the petitioner and the first respondent herein. Thus it is clear that the amendment sought for does not change the basic cause of action and it is only an alternative relief based upon the release deed. The contentions now put forth by the respondents as regards the admissibility of the release deed, the question of limitation and the maintainability of the suit, can as well be agitated by an appropriate written statement and arguments at the time of the hearing of the suit.

9. Order 6, rule 17 of the Code of Civil Procedure is wide enough to take in an amendment of the present nature and my discussions in the paragraphs supra will clearly establish that there is no change in the cause of action. In *L. J. Ieach and Co., Ltd.* v. *M/s. Jardine Skinner & Co.*[1], the Supreme Court has observed as follows:

> "It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the Court to order it, if that is required is the interests of justice."

Thus, it is clear from the above decision of the Supreme Court that an amendment can be ordered in the interests of justice even beyond the period of limitation. I am therefore of the view that the Court below has failed to exercise its discretion vested in it by law and in the interests of justice, the amendment has to be allowed on the facts and circumstances of the present case.

10. In the result, the civil revision petition is allowed, the order of the Court below is set aside and the amendment petition (I. A. No. 1336 of 1981 in O. S. No. 264 of 1976) is ordered as prayed for There will be no order as to costs.

R. S. —— *Petition allowed.*

1. 1957 S. C. J. 313 : 1957 S. C. R. 438 ; A. I. R. 1957 S. C. 357.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Ratnavel Pandian, J.*

Ramalinga Naicker ... *Petitioner**

v.

Chennakrishna Konar and others .... *Respondents.*

Civil Procedure Code (V of 1 908), Order 39, rules 1, 2 and 4—Order granting ex parte *interim injunction—Revision against order—Not maintainable.*

The civil revision petition was filed, by the first defendant being aggrieved by the *ex parte* order made by the Court below on an interlocutory application in the suit filed by the plaintiff under sections 94 and 151 and Order 39, rules 1 and 2, Civil Procedure Code, granting an *ad interim* injunction as prayed for, pending disposal of the said application and directing notice to the revision petitioner and two other defendants.

Held that, admittedly in the present case, the party has not moved the trial Court, availing rule 4 of Order 39. Therefore the order against which the revision is now sought to be filed is not a final reasoned order. The explanation given by the party for not moving the trial Court is that there was no presiding Officer in the District Munsif's Court at the relevant time for him to get a final order by filing a petition under Order 39, rule 4, Civil Procedure Code. On

*C. R. P. (S. R.) No. 119315 of 1982.
16th December, 1982.

vertification from the office, it comes to light that a new officer had already taken charge as District Munsiff on 26th November 1982, that is six days after the filing of the petition. Notwithstanding the above position, as under section 115 (2) the High Court is debarred from varying or reversing any decree or order against which an appeal lies either to the High Court or to any Court subordinate to it, this Court cannot interfere with the impugned order in question by entertaining a revision. [*Para* 9.]

Cases referred to:—

Abdul Shukoor v. *Uma Chander,* 89 L. W. 330 : A. I. R. 1976 Mad. 350 ; *Shah Babulal Khimji* v. *Jayaben,* (1981) 4 S. C. C. 8: A. I. R. 1981 S. C. 1786 ; *Firm Ishardas Devichand* v. *R. B. Prakash Chand,* (1969) 2 S. C. J. 525 : (1969) 1 S. C. C. 664 : (1969) 1 S. C. W. R. 574 : A. I. R. 1969 S. C. 938 ; *R. B. I., Employees' Association* v. *R. B. of India,* (1981) 1 An. W. R. 374 : A. I. R. 1981 A. P. 246 ; *Jasmat Sangaji* v. *Gujarat Electricity Board,* A I. R. 1982 Guj. 254 ; *Zila Parishad Budaun* v. *Brahma Rishi Sharma,* A. I. R. 1970 All. 376 (F. B.) ; *Mrs. Parijatha* v. *Kamalaksha Nayak,* A. I. R. 1982 Karn. 105

Civil revision petition against the judgment and order of the District Munsif's Court, Thiruvanamalai in I A. No. 3762 of 1982 in O. S. No. 1366 of 1982, dated 9th November, 1982, granting *ad interim* injunction against the petitioner and respondents 2 and 3.

R. S. Venkatachari and V. S. Babu for Petitioner.

The Court made the following

ORDER.—This un-numbered revision petition is listed before this Court for deciding as to its maintainability.

2. This petition is filed by the first defendant in O. S. No. 1366 of 1982 on the file of the Court of the District Munsif, Tiruvannamalai, on being aggrieved by the *ex parte* order made by the Court below in I. A. No. 3762 of 1982 in the above case filed by the plaintiff under sections 94 and 151, and Order 39, rules 1 and 2, Civil Procedure Code, granting an *ad interim* injunction as prayed for, pending disposal of the said application and directing notice to the revision petitioner (first defendant) and the other two defendants, returnable by 27th November, 1982.

3. The attack made against this order is that the said order has been passed arbitrarily and without assigning any reason for dispensing with the notice to the petitioner and the other defendants (respondents 2 and 3 herein) and that the said unreasoned order is violative of the principles laid down in the decision in *Abdul Shukoor* v. *Uma Chander*[1], rendered by a Division Bench of this Court, to which I was a party.

4. As against the impugned order, no appeal was preferred before the next competent appellate authority and the reason now submitted by the learned counsel is that the Division Bench in the above case has ruled that :

> "no appeal will lie against an *ex parte* and *interim* injunction; but the specific remedy available in Order 39, rule 4, Civil Procedure Code, has to be availed of by the interdicted party so that a final reasoned order could be obtained in the trial Court itself, against which the Code has provided an obvious appeal under Order 43, rule 1 (*r*), Civil Procedure Code."

And hence he has preferred this Revision which could be entertained by this Court under section 115, Civil Procedure Code. The further reason given by the learned counsel, while re-presenting papers, is that no officer was presiding over the Court of the District Munsif at the time of the filing of this petition. Nevertheless, the specific contention of the learned counsel is that when the party is without any remedy by way of an appeal the revision is competent.

5. In support of his contention, he drew the attention of this Court to some decisions rendered by the other High Courts. He also

1. 89 L. W. 330 : A. I. R. 1976 Mad. 350.

referred to *Shah Babulal Khimji* v. *Jayaben*[1] wherein the Supreme Court has held that a combined reading of the various provisions of the Code of Civil Procedure leads to the irresistible conclusion that section 104 read with the Order 43, rule 1, clearly applies to the proceedings before the trial Judge of the High Court, and in yet another place of the same decision, their Lordships have held that most of the interlocutory orders which contained quality of finality are clearly specified in Clauses (*a*) to (*w*) of Order 43, rule 1, Civil Procedure Code. In yet another decision *viz*., *Firm Ishardas Devi Chand* v. *R. B. Prakash Chand*[2], the Supreme Court has pointed out that the preliminary objection of the respondent therein before the learned District Judge that the impugned order therein passed by the Subordinate Judge under section 151, Civil Procedure Code, and not under Order 39, rules 1 and 2, Civil Procedure Code is not sound because in holding that Order 39, rule 2, did not apply, the learned Subordinate Judge was not exercising his inherent powers, that what the learned District Judge seemed to have done was to hold that the application for temporary injunction did not fall within Order 39, rule 2 and therefore, no appeal lay and that that reasoning was really on the merits of the case and not relevant to the preliminary objection raised by the respondent and that it must therefore, be held that the District Judge and the High Court erred in holding that no appeal lay against the order of the trial Court. Having these decisions in view, now we shall see the other decisions of the various High Courts referred to by the learned counsel, which have taken a view contrary to the one expressed by this Court.

6. The Andhra Pradesh High Court has in *R. B. I. Employees' Association* v. *R B. of India*[3], held that :

> "against an order of injunction passed by the Court below under Order 39, rule 1, Civil Procedure Code, the petitioners have a statutory right of appeal under Order 43, rule 1, clause (*r*), of the Civil Procedure Code, and that under section 115 (2), Civil Procedure Code, the High Court is debarred from varying or reversing any decree or order against which an appeal lies either to the High Court or to any Court subordinate to it."

In that case, the impugned order was passed on 30th October, 1980 without notice to the defendant in that case who had already filed caveat pettititions. The Andhra Pradesh High Court, after making the above observation, held that the order passed by the lower Court on 30th October, 1980 was one passed without jurisdiction and that it was a (*sic*) variable order and therefore could not be interfered with in revision, and that it was not maintainable under section 115, Civil Procedure Code.

7. The next decision on which strong reliance was placed by Mr. Venkatachari is *Jasmat Sangaji* v. *Gujarat Electricity Board, Baroda*[1]. The Division Bench of the Gujarat High Court in that case, differing from the judgment made by this Court in *Abdul Shukoar's case*[2], held as follows :

> "In our view, whenever a trial Court Judge issues an injunction, it would be presumed that he has applied his mind to the material placed before him and on being satisfied about the requirements of the provisions of Order 39, rules 1 and 2, of the Code and also, for reasons, to be recorded as required under rule 3, he thinks it peremptory to pass a comparatively harsh order behind the back of the other side, it goes without saying that such an *ex parte* order is short-lived and tentative and it would be perfectly open to the other side to get it revised, varied or set aside. It is, therefore, difficult for us to agree with the reasoning of the Division Bench of the Madras High Court that if any order under Order 39, rule 1, is made in and by which

1. (1981) 4 S. C. C. 8 : A. I. R. 1981 S. C. 1786 at 1793.
2. (1969) 1 S. C. C. 664 : (1969) 2 S. C. J. 525 : (1969) 1 S C. W. R. 574 : A. I. R. 1969 S. C. 938.
3. (1981) 1 An. W. R. 374 : A. I. R. 1981 A. P. 246.

1. A. I. R. 1982 Guj. 264.
2. 89 L. W 330 : A. I. R. 1976 Mad. 350.

a temporary injunction is granted until the disposal of the suit, that by itself presupposes that there was hearing on the subject-matter and both parties were before the Court at or about the time when such an order was made......"

In doing so, the learned Judges of the Gujarat High Court in that case agreed with the Full Bench of the Allahabad High Court in the case of *Zila Parishad Budaum*[1], from which decision this Court in *Abdul Shukoor's case*[2], was dissented.

8. Reference was also made to the judgment in *Mrs. Parijatha* v. *Kamalaksha Nayak*[3]. In that case, a Division Bench of the Karnataka High Court, relying on *Firm Ishardas Devichand* v. *R. B. Prakash Chand*[4], differed from the view taken by this Court in *Abdul Shukoor's case*[2], to the extent that no distinction can be made between a reasoned and an unreasoned order, because that cannot be decisive on the question of appealability. However, the learned Judges held that—

> "We are in respectful agreement with the conclusion in *Abdul Shukoor Sahib's case*[2], though on somewhat different reasoning" Ultimately they ruled thus :
>
> "For the foregoing reasons, we hold that Order 43, rule 1 (*r*) of the Code does not allow the filing of an appeal from an *ex parte ad interim* order or temporary injunction granted under rules 1 and 2 of Order 39, but the remedy of the aggrieved person is to move the trial Court under rule 4 of Order 39 of the Code in the first instance."

As pointed out *supra*, I was also a party to the Division Bench which rendered the judgment in *Abdul Shukoor's case*[2]. In that case, what the Bench has held after pointing out a number of anomalies which would result in case an appeal is entertained against an order of *ad interim* injunction, is as follows :

> "In order to set at rest such glaring anomalies, the only solution appears to be to hold that no appeal will lie against an *ex parte ad interim* injunction but that the specific remedy available in Order 39, rule 4, Civil Procedure Code, has to be availed of by the interdicted party so that a final respond order could be obtained in the trial Court itself against which the Code has provided an obvious appeal under Order 43, rule 1 (r), Civil Procedure Code."

1. A. I. R. 1970 All 376. (F. B.)
2. 89 L. W. 938 : A. I. R. 1976 Mad. 350
3. A. I. R. 1982 Karn. 105.
4. (1969) 2 S. C. J. 525 : A. I R. 1969 S. C. 938.

The above decision is not shown to be contrary to any of the decisions of the Supreme Court which Mr. Venkatachari has referred to. The Bench has not said in that case that no appeal would lie against such *ad interim* injunction. But, what it has observed is that the remedy of the aggrieved person is to move the trial Court, under rule 4 of Order 39 of the Code in the first instance and thereafter, after obtaining a final order, to prefer an appeal under Order 43, rule 1 (*r*), Civil Procedure Code.

9. Admittedly in the present case, the party has not moved the trial Court, availing rule 4 of Order 39. Therefore the order against which the revision is now sought to be filed, is not a final reasoned order within the expression of the judgment in *Abdul Shukoor's case*[1]. The explanation given by the party for not moving the trial Court is that there was no presiding officer in the District Munsif's Court at the relevant time for him to get a final order by filing a petition under Order 39, rule 4, Civil Procedure Code. On verification from the office, it comes to light that a new officer has already taken charge as District Munsif even on 26th November, 1982, that is, six days after filing of this petition. Notwithstanding the above position, as under section 115 (2), Civil Procedure Code, the High Court is debarred from varying or reversing any decree or order against which an appeal lies either to the High Court or to any Court subordinate to it, this Court cannot interfere with the impugned order in question by entertaining a revision.

10. For all the reasons stated above, this revision is not maintainable at this stage and is accordingly rejected. It is open to the petitioner to move the trial Court under Order 39, rule 4, Civil Procedure Code, to vacate the *ad interim* injunction, if he so desires.

R. S. —— *Petition rejected.*

1. 89 L. W. 938 ; A. I. R. 1976 Mad. 350.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and G. Maheswaran, JJ.,*

S. Abraham ... *Petitioner**

v.

The State of Tamil Nadu, represented by the Chief Secretary to Government Fort St, George, Madras-9 and others ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), sections 6 and 12 (1)—Sale of house property, subject to mortgage—Direction to the purchaser to pay the mortgage amount to the mortgagee—Purchaser claiming benefits under Act—Claim negatived.

The petitioner herein had advanced a sum of Rs. 15,000 on a house property owned by one 'A'. The said 'A' had sold the said house for Rs. 31,500. In the sale deed the mortgage amount payable had been deducted out of the sale consideration as the purchaser had been directed to discharge the mortgage. The purchaser retained the mortgage amount out of the sale consideration and filed an application under section 6 of the Tamil Nadu Debt Relief Act XIII of 1980 for a certificate of discharge of the mortgage on the ground that he came within the definition of 'debtor' as defined in the Act. The application was allowed by the Tahsildar and affirmed by the appellate authority.

A writ petition was filed by the mortgagee to quash these orders.

Held, the purchaser who has undertaken to discharge the liability to pay the mortgage amount on behalf of his vendor, cannot now take advantage of the provisions of the Tamil Nadu Debt Relief Act ignoring the provisions in section 12 (*i*). If the provision in section 12 (*i*) is restricted to a claim made only by the vendor himself, the object of that provision which is to see that the debtor does not make an unlawful or unjust gain by withholding the price of the property will be completely defeated. In this view of the matter the purchaser is not entitled to claim the benefit of section 6 of the Act, in view of the exemption provision contained in section 12 (1). [*Para.* 5.]

Petition under Article 226 of the Constitution of India for issue of a writ of *certiorari* calling for the proceedings of 3rd respondent in D. R. No. 37 of 1980, dated 21st July, 1980 and the consequential order passed by the 2nd respondent in order D. R. A. No. 2 of 1980, dated 31st March, 1981 and quash the said proceedings.

Selvaraj for Selvaraj, Julani and C. Daniel, for Petitioner.

S. Jagadeesan and O. K. Sridevi, for Respondents.

The Order of the Court was made by

Ramanujam J.,—The petitioner herein seeks a writ of *certiorari* from this Court, quashing the order of the second respondent, dated 31st March, 1981 confirming the order of the third respondent, dated 21st July, 1980 holding that the fourth respondent herein is entitled to the benefit of section 6 of Tamil Nadu Act XIII of 1980.

2. The petitioner herein had advanced a sum of Rs. 15,000 on a house property owned by one Alagappa Pillai. The said Alagappa Pillai had sold the said house property to the fourth respondent for Rs. 31,500. In the sale deed executed by Alagappa Pillai in favour of the fourth respondent, the mortgage amount payable to the petitioner had been deducted out of the sale consideration, as the fourth respondent had been directed to discharge the mortgage. That the mortgage amount payable to the petitioner had been retained by the fourth respondent out of the sale consideration, is not in dispute. After the purchase, the fourth respondent, who has retained a sum of Rs. 15,000 representing the entire mortgage amount with him, out of the sale consideration, has filed an application under section 6 of the Tamil Nadu Act XIII of 1980 for a

*W. P. No. 6006 of 1981. *27th January,* 1982.

certificate of discharge of the mortgage, on the ground that he comes within the definition of 'debtor' as defined in the Act. In the said application, he has claimed that his annual household income is less than Rs. 4,800 and therefore, he is entitled to the benefit of the Act. The said application was resisted by the petitioner on the ground that the sum of Rs. 15,000 payable by the fourth respondent represented a portion of the purchase price which has been retained by him for payment to the petitioner as a mortgagee, and as the said amount is a portion of the purchase price, he is exempted from the provisions of the Act, and therefore, whether the fourth respondent is a debtor or not under the Act, the debt in question is not liable to be discharged. In view of the fact that the petitioner sought exemption of this debt from the provisions of the Act, he did not adduce evidence as regards the value of the property purchased by the fourth respondent and on the question whether the worth of the property will disentitle him from claiming the benefits under the Act.

3. Both the initial authority and the appellate authority have gone into the question whether the fourth respondent's annual income is less than Rs. 4,800, and whether the fourth respondent is a debtor as defined in the Act, and after holding that the annual income of the fourth respondent is less than 4,800, they have proceeded to grant the relief sought for by the fourth respondent without going into the question whether the debt in question represents the purchase price of the property purchased by the fourth respondent and whether such a debt is excluded from the provisions of the Act.

4. According to the learned counsel for the petitioner, the debt in respect of which a certificate of discharge is sought for by the fourth respondent, is a debt falling within section 12 (*i*) of Act XIII of 1980, which runs as follows—

"Nothing in this Act shall apply to the following categories of debts and liabilities of a debtor, namely :

(*i*) any debt which represents the price of property whether movable or immovable purchased by a debtor or any amount due under a hire purchase agreement...."

From the facts set out above, it will be clear that a sum of Rs. 15;000 which is payable to the petitioner by the original mortgagor Alagappa Pillai, has been undertaken to be paid by the fourth respondent, the vendee, and he has also retained the said sum of Rs. 15,000 out of the sale consideration or purchase money payable by him towards the purchase of the mortgage property. That the sum of Rs. 15,000 represents a part of the purchase price, is not disputed by the learned counsel for the fourth respondent. But, what is contended on his behalf is that the debt does not represent a portion of the purchase money payable to the petitioner as the property has not been purchased from him.

5. Section 12 (*i*) merely says that if the debt represents the price of property, purchased by a debtor, that is exempted from the provisions, of the Act. It does not refer to ths person who is seeking to recover the debt. According to the learned counsel for the fourth respondent, it is only when the vendor seeks to recover the balance of the purchase price, that provision will come into operation and not when a third party to the contract of purchase files a suit for recovery of the part of the price, If the contention of the learned counsel is accepted, even the assignee of a debt representing the purchase price of a property will not get the benefit of the exemption provision contained in section 12 (*i*). The said provision exempting the debt representing the portion of the purchase price of the property purchased by a debtor is intended to see that the debtor does not make an unjust gain by withholding the price of the property purchased by him, taking advantage of the provisions of the Act. In this case, the fourth respondent has retained the sum of Rs. 12,000 out of the sale consideration payable by him to the vendor and he has undertaken to discharge the liability of the vendor to pay the said mortgage amount of Rs. 15,000. If the fourth respondent does not discharge his obligation of paying Rs. 15,000 to the mortgagee, the petitioner herein, the vendor, can file a suit and recover the entire amount of Rs. 15,000, notwithstanding the provisions of Act XIII of 1980. Therefore, the fourth respondent who has undertaken to discharge the liability to pay Rs. 15,000 on behalf of his vendor, cannot now take advantage of the

provisions of the Act, ignoring the provisions in section 12 (*i*). If the provision in section 12 (*i*) is restricted to a claim made only by the vendor himself, the object of that provision which, as we said, is to see that the debtor does not make an unlawfnl or unjust gain by withholding the price of the property, will be completely defeated. In this view of the matter, we have to hold that the fourth respondent is not entitled to claim the benefit of section 6 of the Act, in view of the exemption provision contained in section 12 (*i*).

6. Therefore, the writ petition has to be and is accordingly allowed and the orders of both the second respondent and the third respondent are quashed. There will be no order as to costs

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Swamikkannu, J.*

Thandavachari and others ... *Petitioners**

v.

Muthuvel Pillai ... *Rerpondent.*

*Civil Procedure Code (V of 1908), section 143 —Extension of time—*Ex parte *decree for possession passed—Application to set aside the decree—Conditional order directing payment of costs passed—Costs not paid—Execution of the decree for possession—Subsequent application for extension of time for payment of costs allowed—Order irregular and illegal and becomes revisable.*

An application for setting aside an *ex parte* decree for possession was granted on condition of the defendant paying a certain sum as costs within a specified date. The condition was not complied with and possession was delivered to the plaintiff in execution. Very much later, the defendant sought extension of time to deposit the costs which the lower Court granted. On revision against the order.

Held:—There was absolutely no justification for any extension of time in the present case inasmuch as the decree-holder had taken possession of the premises in question and had been in possession for six months on the date of the pronouncement of the order under revision. All these aspects have been completely lost sight of by the lower Court and therefore the order extending the time for payment of costs is certainly irregular, and illegal and becomes revisable.

[*Paras.* 6, 7.]

Cases referred to :

P. K. Sukumaran v. *Sulaiman Khan*, (1971) 1 M. L. J. 511 : 84 L. W. 385 : A. I. R. 1971 Mad. 454 ; *Krishnan Dutt* v. *Mahinder Nath*, A. I. R. 1975 J. & K. 18 ; *Periasami Asari* v. *President, Ilupur Panchayat Board*, (1973) 1 M. L. J. 244 : 86 L. W. 258 : A. I. R. 1973 Mad. 250 ; *Mohanth Ramdas* v. *Camta Das* (1962) 1 M. L. J. 167 : 74 L. W. 737 ; *Gobardhan Singh* v. *Barsati*, A. I. R. 1972 All. 246.

Petition under section 115 of Act V of 1908 to revise the order of the District Munsif, Rasipuram, dated 25th September, 1980 in I. A. No. 441 of 1980 in O. S. No. 1059 of 1979, etc.

T. K. Subba Rao, for Petitioner.

P. Sathasivam, for Respondent.

The Court made the following

ORDER:—This is a case in which the respondent herein has kept quiet for a continuous period of six months after a valid order had been obtained by the petitioner herein on 20th March, 1980, for possession of the suit property which was delivered in execution and the delivery was also recorded and the E. P. was closed. As a matter of fact, I. A. No. 441 of 1980, was filed to extend the time for payment of the amount ordered in I. A. No. 1059 of 1979 which petition was under section 5 of the Limitation Act. While disposing of I. A. No. 1059 of 1979 on 21st April, 1979 the lower Court had granted some time within which the amount had to be

*C. R. P. No. 3881 of 1980. 11th December. 1981.

paid. The said amount specified in that order was not paid. But, in the meanwhile, that is, on 20th March, 1980, possession of the suit property was delivered in execution and delivery was recorded and the E. P. was closed. Under the circumstances, when I. A. No. 441 of 1980 had been filed to extend the time for payment of the costs ordered in I. A. No. 1059 of 1979, how the said prayer could be granted and is it not that the said order should be revised under the provisions of section 115 Civil Procedure Code? This is the rhetorical question that emanates from the learned counsel for the petitioner herein. This Court feels that this question has got substance. The contention that is surrounding the said rhetorical question had got valid support in *P. K. Sukumaran* v. *Sulaiman Khan*[1], and *Krishnan Dutt* v. *Mohmder Nath*[2], is the submission made. by Mr. T. K. Subba Rao, learned counsel for the petitioner herein.

2. On the other hand, the learned counsel for the respondent herein refers to the provision under section 148, Civil Procedure Code, which deals with enlargement of time. He relies on the decision in *Periaswamy Asari* v. *President, Iluppur Panchayat Board*[3]

3. Each case has to be to decided on the facts of that particular case. The instant case, which has now reached the stage of a civil revision petition in this Court had a nice story behind it. O. S. No 330 of 1978 was the suit instituted by the plaintiff for declaration and possession On 22nd February, 1979, an *ex parte* decree was passed in the said suit because the defendant's counsel reported no instructions. On 21st April, 1979, I. A. No. 1059 of 1979 was filed by the defendant under section 5 of the Limitation Act for condoning the delay in filing a petition to set aside the *ex parte* decree. As a matter of fact, I. A No. 1060 of 1979 was also filed by the defendant to set aside the *ex parte* decree in the suit O. S. No. 330 of 1978. On 1st February, 1980 the petition for condoning delay, namely, I. A. No. 1059 of 1979 was ordered and a condition was imposed that a sum Rs. 75 has to be paid by way of costs to the other side before 28th February, 1980. This condition was not satisfied. Therefore, on 28th February, 1980, I. A. No. 1059 of 1979 was dismissed for non-compliance with the condition imposed, in I. A. No. 1060 of 1979 for setting aside the *ex parte* decree was also dismissed. On 20th March, 1980, possession of the suit property was delivered in execution and delivery was recorded and the E. P. was closed. From the above details which are not in dispute, it is clear that for a period of about six months, the decree-holder had been in possession of the suit property till the order under revision was passed. How it can be ordered is a big question which had formed itself into a rhetorical question and has emanated from the learned counsel for the petitioner, Mr. T. K. Subba Rao.

4. Now, let me in fairness refer to the decisions cited by the counsel. In *Sukumaran* v. *Sulaiman Khan*[1], which has been relied on by the learned counsel for the petitioner, it was held that it was not possible to say that the time fixed under the conditional decree could be extended by the Court after the default clause had operated and that the remedy for the petitioner could only be by way of review or appeal. In that case, the Court had passed a final order in the suit and the Court did not retain control over the suit any further. In such cases, it was held that it could not be said that either section 148 or 149, Civil Procedure Code, could be invoked. In *Krishnan Dutt* v. *Mohinder*[2], it has been held that section 148 cannot be invoked by the petitioner for condonation of delay because on passing final order, the proceeding had come to an end and the Court became *functus officio*

5. In *Perinsami Asari* v. *President, Iluppur Panchayat Board*[3], relied on by the learned counsel for the respondent, it has been held that the wording of section 148, Civil Procedure Code; allows extension of time even if the original period fixed had expired. It has also been held in that case that it is not necessary that the extension of time should be asked for before the expiry of the period.

1. (1971) 1 M. L. J. 511 : 84 L. W. 385 : A. I. R. 1971 Mad. 454
2. A. I. R. 1975 J. and K. 18.
3. (1973) 1 M. L. J. 244 : 86 L. W. 258 : A. I. R. 1973 Mad. 250.

1. (1971) 1 M. L. J. 511 : 84 L. W. 385 : A. I. R. 1971 Mad. 454.
2. A. I. R. 1975 J. and K. 18.
3. (1973) 1 M. L. J. 244 : 86 L. W. 258 : A. I. R. 1973 Mad. 250.

The counsel for the respondent also relied on *Mohanth Ramdas* v. *Camta Das*,[1] *Gobardhan* v. *Barsati*[2],

6. It is represented by the learned counsel for the respondent that the petition I. A. No. 441 ot 1980 was filed on 14th March, 1980, that is even prior to the possession of the suit properly was ordered and delivered actually in execution which was on 20th March, 1980. In other words, the learned counsel for the respondent submits that even about six days prior to the actual order of possession of the suit property directed by the lower Court, application I. A. No. 441 of 1980 was filed before the lower Court. This is not an excuse. If he was really aggrieved by the order of possession made by the lower Court on 20th March, 1980, the respondent ought to have preferred the suitable remedial measure available to him and if he had kept quiet with respect to the same, but had now come forward with the contention that on 14th March, 1980, itself the application was filed, the said contention does not support his case at all. The said contention has to be repelled under the circumstances. If the respondent has been really aggrieved with respect to the possession that had been ordered, he has to pursue the remedial measures available to him and not agitate that point here in this petition. There is absolutely no justification for any extension of time in the present case inasmuch as the decree-holder had taken possession of the premises in question and had been in possession for six months on the date of the pronouncement of the order under revision merely on the ground that even about six days prior to the order of possession I. A. No. 441 of 1980 was filed. The lower Court has ignored and has completely lost sight of the proceedings that had taken place before it on 20th March, 1980. It is not as if the Court was some other Court which ordered possession. Therefore, even if both the sides had not brought to the notice of the lower Court this aspect, the lower Court ought to have, by itself, gone through the records in the case and enlightened itself before making the order which is under revision. This is a complete dereliction of duty which the lower Court had indulged in by extending the time for payment of the costs. When once an order has been made by it, the lower Court thinks that it is now open to it, after having ordered on 20th March, 1980, possession of the suit property, and when possession had been taken by the petitioner herein and when he had been in continuous possession for six months, to coolly order the petition for extension of time. What is to happen with respect to that person who has taken possession, namely, the revision petitioner herein?

7. All these aspects have been completely lost sight of by the lower Court and therefore, the order extending time for payment of Rs. 75 imposed as a condition in I. A. No. 1059 of 1979 is certainly irregular and illegal and becomes revisable. Hence the civil revision petition is allowed with costs.

R. S. —— *Petition allowed.*

1. (1962) 1 M. L. J. 167 : 74 L. W. 737.
2. A. I. R. 1972 All. 246.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Ratnavel Pandian, J.*

Hyath Basha ... *Petitioner**

v.

Tajan Bi ... *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 23 (1)* (b) *and (2)—Petition by the tenant to reopen the case to examine a witness for proving regular payment of rent—Petition dismissed—Revision against that order, if maintainable.*

(B) *Civil Procedure Code (V of 1908), section 115.*

After examination of the witnesses for the landlord in his eviction petition against the tenant the case stood posted to 15th March, 1982, and thereafter to 13th April, 1982 on which date the tenant represented that he had no witness to be examined on his side. Then the case stood posted, at the request of both the parties to 22nd April, 1982, for

*C. R. P. (S. R.) No. 66126 of 1982.
16th December, 1982.

argument, on which date the petitioner took out an application with an affidavit that he intended to examine a witness on his side. But he had not given either the name of the witness to be examined on his side or the reason for such intended examination. Under these circumstances, the Court dismissed the petition holding that the present application had been taken by the petitioner for the purpose of dragging on the main proceedings. On revision against the order of dismissal.

Held: Unless it is shown that the orders passed in the interlocutory application affect the rights and liabilities of the parties, in the sense, that they become 'final orders', such orders which are procedural in character, cannot be said to be 'final order' coming within the definition of 'order' occurring in section 23 (2) of the Act. The contention that the Rent Controller is a Court for all purposes is not tenable. For the abovesaid reasons the revision is not maintainable. [*Paras.* 5 *and* 6]

Cases referred to:—

Venkaimarban v. *Dakshinamurthy*, (1981) 94 L. W. 243 : (1981) 1 M. L. J. 275 : (1981) 2 R. C. J. 415 ; *Central Bank of India* v. *Gokal-Chand*, (1967) 2 S. C. J. 828 : (1967) 1 S. C. R. 310 : A. I. R. 1957 S.C. 799; *Chinnaraju Naidu* v. *Bavanibai*, (1981) 2 M. L. J. 354 : 94 L. W. 745 : (1982) 1 R. C. J. 557 ; *Appulu* v. *Fatima Zohra*, (1982) 2 M. L. J. 340 ; *Lakshmi Ammal* v. *V. R. Sivasubramaniam*, (1981) 94 L. W. 366 : (1981) 2 M. L. J. 206 ; *Rethinasami* v. *Komalavalli*, (1982) 2 M. L. J. 406 : 95 L. W. 552 ; *Jugal Kishore Singh* v. *Co-operative Bank*, (1967) 3 S. C. R. 163 : (1967) L. W. (Crl.) 105 : A. I. R. 1967 S. C. 1494.

Civil Revision Petition against M. P. 9 of 1982 in H. R. C. O. P. No. 16 of 1980, dated 22nd April, 1982, Principal District Munsif Court, Thiruvannamalai.

R. S. Venkatachari, for Petitioner.

The Government Pleader, for Respondent.

The Court delivered the following

JUDGMENT.—This revision is sought to be filed by the tenant in H. R. C. O. P. No. 16 of 1980 on the file of Rent Controller (Principal District Munsif), Thiruvannamalai, against the order passed by the Rent Controller dismissing M. P. No. 1982 filed by him for reopening the case for the purpose of examining the petitioner's witness, *viz.*, the previous landlord's son, Sri Mohan Kumar for proving the regular payment of rent.

2. It transpires from the impugned order that after examination of the witness on the side of the landlord, the case stood posted on 15th March, 1982 and thereafter on 13th April, 1982 on which date the tenant represented that he had no witness to be examined on his side. Then the case stood posted, at the request of both the parties, to 22nd April, 1982 for arguments, on which date the petitioner took out an application with an affidavit that he intended to examine a witness on his side. But, he has not given either the name of the witness to be examined on his side or the reasons for such intended examination. It was under these circumstances the Court dismissed the petition holding that the present application had been taken by the petitioner for the purpose of dragging on the main proceedings. Hence this revision.

3. The office of the High Court has returned this petition requesting the counsel to state how the revision would be maintainable under section 115, Civil Procedure Code, without exhausting the remedy of an appeal provided under the Tamil Nadu Buildings (Lease and Rent Control) Act, (XIII of 1960) (hereinafter referred to as the Act). The papers were re-presented by the counsel stating that as there is conflict of opinion as to the maintainability of a civil revision petition under the Act and the as this Court has held that the Rent Controller is also a civil Court this revision is competent under section 115, Civil Procedure Code. In support of this contention he relies on the decision of this Court in *Venkaimarban* v. *Dakshinamurthy*[1].

4. The question that arises for my consideration is whether this revision is maintainable. Section 115 (2), Civil Proce-

1. (1981) 1 M. L. J. 275 : (1981) 2 R. C. J. 415 : 94 L. W. 243.

dure Code enacts that the High Court shall not under this provision vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. In the present proceedings, the Act provides for an appeal by any person aggrieved by an order passed by the Rent Controller. Now, I shall refer to some of the decisions before adverting to the argument of the learned counsel for the petitioner. A qnestion arose before the Supreme Court in *Central Bank of India* v. *Gokalchand*[1], whether an appeal would lie against an order passed in an interlocutory application. In that case, the Supreme Court observed that the words "every order" occurring in section 38 (1) of the Delhi Rent Control Act, 1958, passed by the Rent Controller, though very wide, do not include interlocutory orders which are merely procedural and do not affect the rights and liabilities of the parties and in a pending proceeding the Controller may pass many interlocutory orders such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises fixing a date of hearing and the admissibility of a document or the relevance of a question, and that all these interlocutory orders are steps taken, towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceedings; they regulate the procedure only and do not affect any right or the liability of the parties. It has been further observed therein that the legislature could not have intended that the parties would be harassed with the endless expenses and delay by appeals from such procedural orders and that it is open to any party to set forth the error, defect or irregularity, if any, in such an order as the ground of objection in his appeal from the final order in the main proceeding.

5. Following the above judgment, I have held in *Chinnaraju Naidu* v. *Bavanibai*[2], that all interlocutory orders passed through the proceedings under the Act cannot be said to be orders within the meaning of section 23 (1) (*b*) of the Act and that only the orders that affect the rights and liabilities of the parties, in the sense that they become final orders though passed in interlocutory applications, such as refusing to set aside *ex parte* orders etc., are appealable and that it is, however, open to the parties to set forth the error, defect or irregularity, if any, in such an order as the ground of objection in his appeal from the final order in the main proceedings. See also *Appulu* v. *Fatima Zohra*[1], and *Lakshmi Ammal* v. *V R. Sivasubramaniam*[2]. Therefore, it is clear from the above decisions that unless it is shown that the orders passed in the interlocutory applications affect the rights and liabilities of the parties, in the sense that they become final orders, such orders, which are procedural in character, cannot be said to be final orders coming within the definition of 'order' occurring in section 23 (2) of the Act.

6. Mr. Venkatachari, contends that the authorities under the Act are also Courts and hence revision would lie against the interlocutory orders passed by the said authorities when the institution of an appeal against such order is barred. In support of his contention, he relied on two decisions of this Court, *viz.*, *Venkatmarben* v. *Dakshinamurthy*[3] judgment of Balasubrahmanyan, J., and the judgment of a Division Bench of this Court in *Rethinasami* v. *Komalavalli*[4]. In the first-cited decision, Balasubrahmanyan, J., has held that the Appellate Authority under section 23 of the Act can well be held to be a Court for purposes of section 5 of the Limitation Act. In *Rethinasami's case*[4], *Jugal Kishore Singh's case*[5], second cited, the Bench has held:

> "Though the authorities (The Rent Controller and the Appellate Authority under the Act) are not described as Courts, the procedure and final decisions are akin to of that a Court, as observed by the Supreme Court in *Jugal Kishore Singh's case*[5]. The above view is in tune with the definition of the word 'Court' found in

1. (1967) 2 S. C J. 828 : (1967) 1 S. C. R. 310: A. I. R. 1967 S. C. 799.
2. (1981) 2 M. L. J. 354 : 94 L. W. 745 : (1982) R. C. J. 557.

1. (1982) 2 M. L. J. 340.
2. (1981) 94 L. W. 366 : (1981) 2 M. L. J. 206.
3. (1981) 1 M. L. J. 275 : 94 L. W. 243 : (1981) 2 R. C. J. 515.
4. (1982) 2 M. L. J. 406 ; 95 L. W. 552.
5. (1967) 3 S. C. R. 163 : (1967) L. W. (Crl.) 105; A. I. R. 1967 S. C. 1494.

section 3 of the Madras Court-Fees Act, section 3 of the Evidence Act and section 20 of the Indian Penal Code."

Having observed thus, it has been concluded as follows :

"In the result, we hold that for the purpose of sections 3, 4 and 29 (2) of the Indian Limitation Act, the Appellate Authority is a Court and section 5 of the Limitation Act is applicable to an appeal preferred by the petitioner herein before the Appellate Authority constituted under section 23 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act (XIII of 1960)."

A thorough reading of both the decisions would show that the learned Judges in the above two decisions have held that the Rent Controller and the Appellate Authority are Courts only for the purpose of invoking certain provisions of the Limitation Act. Therefore, the contention of the learned counsel that the Rent Controller is a Court for all purposes is not tenable and acceptable. For the reasons stated above, I hold that the revision cannot be entertained under section 115, Civil Procedure Code.

7. In this connection I would also refer to section 23 (3) of the Act, which says that the Appellate Authority can also make further enquiry, if he thinks fit, either personally or through the Controller for arriving at a just decision in the appeal. In other words, he can also take evidence, if necessary. Hence, the contention of the learned counsel that as the order of the Rent Controller shutting out the petitioner herein from letting in further evidence is held appealable, his only remedy is by way of a revision under section 115, Civil Procedure Code, cannot be countenanced. In the result, I hold that this revision is not maintainable, and it is accordingly rejected.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

N. **Balasubramania Iyer** ... *Appellant**

v.

Sri Ponneswari and Muthu Kumaraswamy Devasthanam by its Managing Trustee K. Natarajan ... *Respondent.*

(A) *Tamil Nadu City Tenant's Protection Act (XIX of 1955), sections 9, 3 and 11—Lessee putting up superstructure on demised land—Termination of tenancy—Whether tenant entitled to compensation for superstructure—Notice under section 11 not issued—Waiver of notice—Effect.*

(B) *Transfer of Property Act (IV of 1882), section 106—Notice terminating tenancy—Validity.*

The landlord-Devasthanam filed a suit against the tenant for ejectment and for future mesne profits. It was alleged that the defendant unauthorisedly put up a superstructure on land licensed to him by the temple to tether cattle and therefore was not entitled to compensation. The defendant claimed to be a lessee entitled to benefits under the Tamil Nadu City Tenants' Protection Act. The trial Court held the defendant to be only a licensee and was not permitted to put up any superstructure. It granted a decree for ejectment and a decree for mesne profits at the rate of Rs. 10 per month. The decree was confirmed by the lower appellate Court though it held the defendant to be a lessee since the concerned land was part of the outer prakaram and nandavanam of the temple and was inalienable property. On second appeal by the defendant,

Held: Though a lessee is not entitled to claim the benefits under section 9 of the Tamil Nadu City Tenants Protection Act still, he will be entitled to compensation under section 3 for any superstructure he

*S.A. No. 1696 of 1981. *7th July, 1982.*

might have erected on the property and has been ejected. Admittedly in this case no notice under section 11 of the Act had been issued and a notice of termination of the tenancy as contemplated under section 106 of the Transfer of Property Act, alone has been issued. If the appellant was a tenant coming within the scope of the Act, it cannot be said that he is not entitled to the benefits of section 11. However on the facts of this case the defendant should be deemed to have waived the notice by his conduct. There was a notice terminating the tenancy and there was a reply. In the reply the defendant never raised the plea that he was entitled to a notice under section 11 of the City Tenants' Protection Act and the notice issued under section 106 of the Transfer of Property Act was invalid. Even in the written statement the defendant did not take up the plea that the suit is not maintainable in view of the lack of notice under section 11 of the Act. Besides neither in the trial Court nor in the lower appellate Court he has raised the plea that the suit is not maintainable for non-issue of notice under section 11. This conduct of the defendant will lead to the inference of waiver on his part. Waiver is a question of fact and since there has been a waiver on the part of the defendant, the present suit will lie without compliance of section 11 of the Act. While sustaining the decree in ejectment, the respondent was directed to pay to the appellant-tenant or deposit into the trial Court a sum of Rs. 750 as compensation for the superstructure before executing the decree in ejectment. [*Paras.* 8, 9 *and* 11.]

Cases referred to:—

Sambandam Chetty v. *St. Xavier Francis Church*, (1973) 2 M. L. J. 2 ; *Sivananda Gramani* v. *Mohd. Ismail*, (1959) 1 M. L. J. 263 : 71 L. W. 256 ; *Vedachala Naicker* v. *Duraiswami Mudaliar*, (1950) 1 M. L. J. 732 ; *Natesa Naicker* v. *Vedagiri*, (1975) 1 M. L J. 301.

Appeal against the decree of the District Court, Tiruchirapalli in Appeal Suit No 609 of 1976, preferred against the decree of the Court of the District Munsif of Tiruchirapalli in Original Suit No. 1031 of 1975.

T. R. Venkataraman, for Appellant.

R. Gandhi, K. B. K. Vasuki and *S. Radhakrishnan*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in O. S. No. 1031 of 1975 on the file of the District Munsif, Tiruchirapalli is the appellant herein. The said suit was filed by the respondent for ejectment and for future mesne profits as against the defendant. The plaintiff's case as set out in his plaint is that the defendant had been licensed to tie his cattle in the suit property measuring 25′ × 15′ about 7 years ago on a fee of Rs. 10 per month, that the defendant unauthorisedly put up a shed on the wall of the plaintiff's temple, that the value of the superstructure put up by the defendant will be worth Rs. 150, that the plaintiff revoked the licence or the lease by the end of February, 1975, that the defendant is in arrears of licence fee, that the defendant is therefore liable to be ejected and that the Tamil Nadu City Tenants' Protection Act has no application to the case. The plaintiff is therefore entitled to a decree in ejectment as also mesne profits at the rate of Rs. 10 per month.

2. The defendant resisted the suit contending that he took up a plot about 20 years ago on a monthly ground rent of Rs. 3 and constructed the superstructure for his residence at a cost of Rs. 1,500 that the ground rent was gradually increased to Rs. 10 per month, that the superstructure was periodically renewed, and that he is entitled to the benefits of the City Tenants' Protection Act and therefore he cannot be ejected from the suit property. The plaintiff's allegation that he is only a licensee and that the value of the superstructure is only Rs. 150 is incorrect. The suit is an outcome of spite and illwill borne by the trustees of the plaintiff temple towards the defendant, that the defendant is regularly paying the rent and he is not a defaulter and that, therefore, he is not liable to be evicted from the suit property.

3. On these pleadings the trial Court framed the following four issues :

(1) Whether the defendant is a lessee or licensee of the suit property?

(2) Whether the defendant has been permitted to put up the superstructure?

(3) Whether the defendant is entitled to the benefits of the City Tenants Protection Act?

(4) To what relief is the plaintiff entitled?

After analysing the evidence adduced by the parties, the trial Court held on the first issue that the defendant is only a licensee and not a lessee of the suit property, and on issues 2 and 3 it held that the defendant was not permitted to put up any superstructure and that the Tamil Nadu City Tenants' Protection Act, hereinafter referred to as the Act applied to the area after the Act was extended to the suit village but as he was not permitted to put up any superstructure, he is not entitled to the benefits of the said Act. In this view, the trial Court granted a decree in ejectment and a decree for mesne profits at the rate of Rs. 10 per month from the date of plaint till the date of delivery of possession.

4. The defendant took the matter in appeal and the lower appellate Court held that even though the defendant may be entitled to the benefits of the Act, still he cannot continue in possession of the property or purchase the same under section 9 of the Act as the suit property is part of the outer prakaram and nandavanam of the temple, which are normally inalienable and, therefore, the defendant is not entitled to claim the benefits under the Act. In this view, the lower appellate Court sustained the decree in ejectment passed by the trial Court.

5. In this second appeal, the learned counsel for the appellant raised substantially two contentions. (1) The finding of the Courts below that the suit property is part of outer prakaram and nandavanam of the temple cannot be sustained on the basis of the evidence on record and, therefore, that finding should be taken to be vitiated. (2) Once the Act has been extended to the village in question of and the defendant is held to be entitled to the benefits of the Act, the lower appellate Court is wrong in dismissing the suit merely on the ground that the suit property is inalienable or *res extra commercium* ignoring the obvious fact that even if the defendant is not entitled to the benefits of section 9, still he will be entitled to claim the benefit under sections 3 and 11 of the Act and in this case no compensation has been ordered, nor the validity of the termination notice has been tested with reference to section 11.

6. It is no doubt true that though the trial Court held that the defendant is only a licensee and not a lessee, the lower appellate Court has proceeded on the basis that the defendant is a lessee of the suit property for purposes of deciding the question as to whether he is entitled to the benefits of the Act and ultimately held that though the defendant is entitled to the benefits of the Act, he is not entitled to the benefit of section 9 for the reason that the land which has been leased out is inalienable. The lower appellate Court also held that the trustees had no power to lease a portion of the prakaram and nandavanam.

7. On the first question, the learned counsel for the appellant would say that there was no issue framed by the trial Court as to whether the suit property is part of the out-prakaram and nandavanam of the temple and, therefore, the lower appellate Court was not justified in giving a finding that it is part of outer prakaram and nandavanam of the temple and, therefore, the matter should be remitted to the trial Court to give a finding on that question. It is seen that even in the copy of the notice, Exhibit A-5 issued on behalf of the plaintiff before filing the suit it has been stated that the suit site is the outer prakaram of the temple and the trustees have no power to lease out the property to the defendant and as such, the defendant is not entitled to the protection under the Act. In the reply notice, Exhibit A-1 the defendant has not specifically denied the said averment. Further, in paragraph 3 of the plaint the suit property is mentioned as outer prakaram and part of nandavanam. The defendant in his written statement has not denied the said allegation specifically and, therefore, the lower appellate Court proceeded on the basis that both parties went for trial on the basis that the suit property is the outer prakaram of the temple. Having regard to the fact that the defendant had at

no stage disputed the fact that the suit property is part of the outer prakaram of the temple, he cannot now ask for a fresh trial on that question. Having regard to the nature of the pleadings, the lower appellate Court appears to be right in holding that the suit property was part of the outer prakaram and nandavanam of the temple. If the suit property is part of the outer prakaram of the temple, then the lower appellate Court's finding that the suit land is inalienable and therefore the defendant is not entitled to claim the benefit of section 9 of the Act cannot be taken exception to.

8. The next question is even though the defendant is held not entitled to the benefit of section 9 of the Act, whether he can claim the benefits of the other provisions of the Act such as sections 3 and 11. In this case the lower Courts held that the defendant is not entitled to the benefits of section 9 of the Act and therefore, decreed the plaintiff's suit. It is well-established that though a lessee is not entitled to claim the benefits under section 9 of the Act, still he will be entitled to compensation under section 3 for any superstructure which he right have erected on the suit property. In *Sambandam Chetty* v. *St. Xavier Francis Church*[1], it was held that the Court is entitled to give compensation under section 3 of the Act though section 9 is not applicable to the facts and circumstances of the case. In *Sivananda Gramani* v. *Mohd. Ismail*[2], it was held that although the tenant cannot claim any benefits under section 9 of the Act by reason of the fact that the property would not be deemed to be a land within the meaning of section 9, he would still be entitled to claim compensation under section 3 for the superstructure which he has erected on the land. Thus the legal position is clear that the defendant, though not entitled to claim the benefits under section 9 of the Act, is entitled to claim compensation under section 3 on his being ejected

9. The further question is whether the tenant is entitled to the benefits of section 11 although he was held not entitled to the benefits of section 9. Admittedly in this case no notice under section 11 of the Act has been issued and a notice of termination as contemplated under section 106 of the Transfer of Property Act alone has been issued which has been marked as Exhibit A-5. If the appellant is held to be a tenant coming within the scope of the Act, then I do not see how he is not entitled to the benefits of section 11. I therefore hold that he is entitled to claim the benefits of section 11. However, on the facts of this case the defendant should be deemed to have waived the notice by his conduct. There was a notice terminating the tenancy under Exhibit A-5 and there was a reply by the defendant under Exhibit A-1. In the reply the defendant never raised the plea that he is entitled to a notice under section 11 of the Act and the notice issued under section 106 of the Transfer of Property Act is invalid. Even in the written statement, the defendant did not take up the plea that the suit is not maintainable in view of lack of notice under section 11. Besides, neither in the trial Court nor in the lower appellate Court he has raised the plea that the suit is not maintainable for non-issue of a notice under section 11. This conduct of the defendant will lead to the inference of waiver of notice on his part. Waiver is a question of fact and facts in this case establish that there has been a waiver on the part of the defendant, and therefore, the suit will lie without the compliance of section 11. In *Vedachala Naicker* v. *Duraiswami Mudaliar*[1], the Court held that it is open to the tenant to waive protection offered to him under section 11 and request the Court to give the relief provided for in section 9. *Natesa Naicker* v. *Vedagiri*[2], following the decision in *Vedachala Naicker* v. *Duraiswami Mudaliar*[1], and held that where a tenant without claiming the benefit of the notice under section 11 merely files an application claiming the benefit under section 9 he must be taken to have lost his right by waiver of the notice under section 11. In this case only at the time of the arguments before this Court the necessity for the issue of a notice under section 11 has been pointed out by the learned counsel and at no earlier stage the defendant claimed the benefit of section 11. I have to therefore hold that section 11 notice has been waived by the defendant.

1. (1973) 2 M. L. J. 2.
2. (1959) 1 M. L. J. 263 : 71 L. W. 256.

1. (1950) 1 M. L. J. 732.
2. (1975) 1 M. L. J. 301.

10. From the above discussion it will be seen that the defendant is entitled, on ejectment, to claim compensation for the superstructure erected by him on the land. This leads to the further question as to what is the compensation payable to the defendant for his superstructure. In the notice Exhibit A-5 as well as in the plaint the plaintiff has valued the superstructure at Rs. 150 while the defendant has valued the superstructure at Rs. 1,500 on the date of erection which was twenty years ago.

11. The trial Court, after considering the report of the Commissioner who had inspected the superstructure, has determinated the value of the superstructure at Rs. 400. Having regard to the nature of the superstructure and the materials used therein as is seen from the report of commissioner, I value the superstructure at Rs. 750. Therefore, while sustaining the decree in ejectment passed by the Courts below, the respondent is directed to pay to the appellant or deposit into the trial Court a sum of Rs. 750 as compensation for the superstructure before executing the decree in ejectment against the appellant.

12. In the result, the second appeal is allowed in part as indicated above. There will, however, be no order as to costs.

R. S. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and T. N. Singaravelu, JJ.*

M/s. Oriental Fire and General Insurance Company Limited ... *Appellant**

v.

Alamelu and others ... *Respondents.*

(A) *Motor Vehicles Act (IV of 1939), section 95 (2) and Workmen's Compensation Act (VIII of 1923)—Checking inspector employed by transport company engaged in checking the tickets—While so, concerned vehicle getting off the road, dashing against a palmyra tree and capsizing— Checking inspector crushed to death — Dependants of the deceased claiming compensation —Insurance company resisting claim and relying on section 95 (2) of the Act—Insurance policy containing a clause covering such persons—Insurance company liable to pay compensation upto the limit prescribed in Workmen's Compensation Act.*

(B) *Maxim*—Res ipsa loquiter—*Applicability.*

The deceased, a checking inspector employed by a transport company while checking the tickets in a bus of the owner was thrown off the vehicle and crushed to death due the bus dashing against a palmyra tree and capsizing because of rash and negligent driving. On a a claim petition filed by the dependants of the deceased, the Motor Accidents Claims Tribunal awarded a compensation of Rs. 25,000 payable by the Insurer. In appeal by the Insurer against the award it was contended that the risk of a checker need not be covered by section 95 (2) of the Motor Vehicles Act and therefore the Insurer was not liable at all for his death. It was further contended that even if the insurance company was liable to indemnify, the extent upto which the insurer was to indemnify the owner of the vehicle was limited under the Workmen's Compensation Act and as such it will not extend to the entire amount awarded by the Tribunal.

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*A. A. O No. 138 of 1979, *9th September,* 1981.

Held, the insurer in the present case has, in fact, covered the risk of all employees travelling in the bus under the contract of insurance. A reading of clause (2) in the policy indicates that the company shall not be liable in respect of death or bodily injury to any person other than a passenger carried by reason of or in pursuance of contract of employment, being carried in or upon the motor vehicle at the time of the occurrence. Thus the exception from liability contained in the proviso will not apply to a person carried in the vehicle in pursuance of a contract of employment. Thus, even though the appellant is not bound to indemnify the insured under section 95 (2) in respect of the employees other than the driver, conductor and the loaders, the insurer under the policy issued seems to have covered the liability of a person under the main provision in section 2 (2) in respect of persons who are carried in the vehicle in pursuance of a contract of employment. Normally, the insurer's liability is to be determined not only with reference to the statutory provisions of section 95 (2) of the Motor Vehicles Act, but also with reference to the contract of Insurance, which it has entered into with the insured. Though the opening words in clause (*c*) to the proviso refers to the liability under section 95 of the Motor Vehicles Act, the parenthetic clause therein 'other than a passenger carried by reason of or in pursuance of a contract of employment', will bring in any employee who was travelling in the vehicle in the course of his employment. [*Para.* 6.]

However, the limit of liability contained in section 95 of the Motor Vehicles Act will apply as regards the quantum of compensation and the compensation under section 95 of the Motor Vehicles Act is limited to the amount payable by the insurer under the Workmen's Compensation Act in relation to the employee. In this case, the Tribunal has specifically held that under the Workmen's Compensation Act, the compensation payable by the appellant will come to Rs. 18,000. Therefore, the appellant's liability as an insurer has to be limited only to the sum of Rs. 18,000. The balance of Rs. 7,000 has to be paid by the owner of the vehicle. [*Para*. 7.]

In this view of the matter, the appeal is allowed and the award of the Tribunal is modified.

Appeal against the order of the Motor Accidents Claims Tribunal and District Court, Thanjavur West, dated 19th April, 1978 in M. A. C. T. O. P. No. 42 of 1977.

K. C. Jacob and *Raju* and *K. Lukose*, for Appellant.

V. T. Gopalan, S. Radha Gopalan, R. G. Rajan, M. V. B. Baskaran and *S. Ethiraju*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—The insurer of the vehicle M. D. S. 8287, which was involved in a fatal accident and against whom an award was passed for a sum of Rs. 25,000 by the Tribunal in M. A. C. T. O. P. No. 42 of 1977, is the appellant herein.

2. On 15th February, 1977, at about 9-30 A. M. one Kunjithapatham was checking in the said bus, as he was a checking inspector employed by the transport company which owns the bus. While he was so checking the tickets, the vehicle got off the road and dashed against a palmyra tree and capsized. As a result of the sudden jerk and unexpected dashing and capsizing of the bus the said Kunchithapatham was crushed to death. On the ground that the accident was due to the rash and negligent driving of the said bus by its driver, the dependants of the deceased Kunchithapatham filed a claim petition in M. A. C. T. O. P No. 42 of 1977 claiming a compensation of Rs. 50, 000 for his death.

3. The said claim petition was opposed by the owner of the vehicle and the insurer with which the vehicle had been insured. The owner's case was that the accident was not due to the rash and negligent driving of the bus by its driver, the road was too narrow at that place and on seeing a lorry coming on the opposite direction, the driver of the bus, in order to give way to the lorry, went to the left side of the road and the wheels got struck in the sandy portion and that it ultimately dashed against the palmyra tree and

capsized. According to him, the accident was an inevitable one. They also contended that in any event the compensation claimed was excessive. The insurer filed a counter-statement contending that the accident took place as a result of a mehanical defect and the deceased, was standing at the foot-board in a careless manner, fell on the road and sustained injury on his head and died.

4. The Tribunal, after considering the evidence adduced by the parties, held that the accident was clearly due to the rash and negligent driving of the bus by its driver. In that view, the Tribunal awarded a compensation of Rs. 25,000 to the claimants payable by the insurer. Aggrieved by the award of the Tribunal the Insurer has come on appeal.

5. Though the finding of the Tribunal that the accident was solely due to the rash and negligent driving of the bus by its driver is sought to be challenged, the circumstances under which the accident took place will clearly attractthe principle of *res ipsa loquiter*. The fact that the vehicle had gone off the road and hit against the palmyra tree and rolled down would indicate the rash and negligent driving of the bus by its driver. We cannot, therefore, interfere with the finding of the Tribunal that the accident was solely due to the rash and negligent driving of the bus by its driver.

6. Coming to the quantum of compensation the appellant's contention is that the deceased, being a checker, his risk need not be covered as per the provisions of section 95 (2) and therefore, the insurer cannot be held liable at all for his death. It is also contended by the learned counsel for the appellant, that even if the Insurance company is bound to indemnify the owner as regards the risk to a checker, the extent upto which the insurer has to indemnify the owner of the vehicle is limited under the Workmen's Compensation Act and as such it will not extend to the entire amount awarded by the Tribunal. Though the learned counsel appearing for the appellant has relied on the provisions of section 95 (2) to disclaim the insurer's liability to cover a risk to a checker travelling in a bus, we find that the insurer has, in fact, covered the risk of all employees travelling in the bus under the contract of Insurance. Section 2 of the Policy deals with the Insurer's liability to third parties. Clause (*i*) of section 2 says:

> "Subject to the limits of liability the Company will indemnify the Insured against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the motor vehicle."

Then the proviso contains on exception; clause (*c*) of the proviso is as follows :

> "Except so far as is necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939, in relation to liability under the Workmen's Compensation Act, 1923, the company shall not be liable in respect of death of or bodily "injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises."

A reading of that clause indicates that the company shall not be liable in respect of death or bodily injury to any person other than a passenger carried by reason of or in pursuance of contract of employment, being carried in or upon the motor vehicle at the time of the occurrence. Thus the exception from liability contained in the proviso will not apply to a person carried in the vehicle in pursuance of a contract of employment. Thus, even though the appellant is not bound to indemnify the insured under section 95 (2) in respect of the employees other than the driver, conductor and the loaders, the insurer under the policy issued seems to have covered the liability of a person under main provision in section 2 (2) in respect of persons who are carried in the vehicle in pursuance of a contract of employment Normally, the insurer's liability is to be determined not only with reference to the statutory provisions of section 95 (2) of the Motor Vehicles Act, but also with reference to the contract of Insurance, which it has entered into with the insured. Though the opening words in clause (*c*), set out above, refers to the liability under section 95 of the

Motor Vehicles Act, the parenthetic clause therein 'other than a passenger carried by reason of or in pursuance of a contract of employment' will bring in any employee, who was travelling in the vehicle in the course of his employment. In our view, therefore, under the terms of the policy the insurer cannot disclaim liability *in toto.*

7. However, the limit of liability contained in section 95 of the Motor Vehicles Act will apply as regards the quantum of compensation, and the compensation under section 95 of the Motor Vehicles Act is limited to the amount payable by the insurer under the Workmen's Compensation Act in relation to that employee. In this case, the Tribunal has specifically held that under the Workmen's Compensation Act, the compensation payable by the appellant will come to Rs. 18,000. Therefore, the appellant's liability as an insurer has to be limited only to the sum of Rs. 18,000. The balance of Rs. 7,000 has to be paid by the owner of the vehicle.

8. In this view of the matter, the appeal is allowed and the award of the Tribunal is modified as follows—Out of the sum of Rs. 25,000 awarded as compensation, the insurer, who is the second respondent in the claim petition, is liable to pay a sum of Rs. 18,000 and the owner of the vehicle the first respondent M. A. C. T. O. P. No. 42 of 1977 is liable to pay the balance of Rs. 7,000 to the claimants. There will be no order as to costs.

R. S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and S. Nainar Sundaram, JJ.*

Western Indian Timbers, Mettupalayam by Managing Partner, K. Pavithran

... *Appellant**

v.

The District Forest Officer, Nilgiris and others ... *Respondents.*

(A) *Constitution of India (1950), Article 226 —Effective alternative remedy available—Whether a writ petition is maintainable.*

(B) *Tamil Nadu Forest Act (V of 1882), sections 35 and 36 and Tamil Nadu Timber Transit Rules (1968), rule 3 — Cancellation of Form II permit without notice — Validity—Scope of Rule 3* (iii).

The appellant has alleged that he has purchased timber and firewood of various discriptions from respondents 4 to 9 whose lands are situate in the Nilgiris Hills. After purchasing, for cutting the timber and taking them away, the appellant applied for Form II permits and was transporting the timber and the firewood, one such permit for transporting timber was valid upto 30th September, 1972 and the permit for transporting firewood was valid up to 31st March, 1973. All of a sudden according to the appellant the first respondent cancelled the Form II permit and thereby disabled the appellant herein from transporting the cut timber and firewood. According to the appellant he is lawfully entitled to transport the timber and firewood which he has purchased and the cancellation of the From II permits without any notice to him violative of the principles of natural justice. Immediately after the cancellation, the appellant approached the High Court by way of writ petition. A single Judge dismissed the petition on the ground that the period of the permit was already over and that the appellant has to invoke the jurisdiction of the civil Court for effective and

*W. A. No. 76 of 1977. *5th October, 1982.*

efficacious remedy and not the writ jurisdiction under Article 226 of the Constitution.

Held: In this case it is clear that the owners of the timber and firewood who have sold them have written letters to the first respondent requesting him to cancel the Form II permit issued in favour of the appellant stating that they have sold the timber and firewood to the third respondent herein. The appellant has to establish not only his right to have the Form II permit but also his proprietory right to those goods. *Prima facie* the appellant may have a strong case to agitate his right over the timber and firewood Nevertheless, it is a disputed question of fact which can be decided only on letting in evidence. If that be so, the effective and efficacious remedy will be only by was of a suit and not through writ proceedings under Article 226 of the Constitution of India. The appellant can have the remedy of getting damages again the owners of the timber if he makes out a case that injury has been caused to him by the action taken by the respondents. Further any writ issued at present will be futile inasmuch as the time granted in the permits has lapsed long back. [*Para*. 7.]

Form II permit is granted, either to the owner of the patta lands or to his nominee or agent. Where the owners of the patta lands themselves request the concerned Officer to cancel the licence there is no question of issuing notice to their nominee before the cancellation of the permit. [*Para*. 6.]

Cases referred to:—

Babu Ram v. *Zila Parishad*, (1969) 1 S. C. J. 878 : (1969) 1 S. C. R. 518 : A. I. R. 1969 S. C. 556 ; *P. B Reddy* v. *State of Mysore*, (1969) 2 S. C. J. 114 : (1969) 3 S. C. R. 141 : (1969) 1 S. C. C. 68 : A. I. R 1969 S. C. 655.

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice Koshal, dated 15th December, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2278 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 1st Respondent, relating to the cancellation of Form II permits for transport of timber and firewood issued to the petitioner, and quash the same.

C. Rajan, for Appellant.

K. Natarajan, Government Pleader, for Respondents Nos. 1 and 2.

T. V. Sekar for *K. Radhakrishnan*, for Respondent No. 3.

The Judgment of the Court was delivered by

Gokulakrishnan, J.—The writ petitioner is the appellant herein. He filed the writ petition praying to call for the records of the District Forest Officer, Nilgiris relating to the cancellation of Form II permitf for transport of timber and firewood issued to the appellant and to quash the same as illegal.

2. The appellant has alleged that he has purchased timber and firewood of various descriptions from respondents 4 to 9 whose lands are situated in the Nilgiris Hills. After purchasing for cutting the timber and taking them away, the appellant applied for Form II permits and was transporting the timber and firewood. One of such permits for transporting timber was valid until 30th September, 1972 and the permit for transporting firewood was valid upto 31st March, 1973. All of a sudden, according to the appellant herein, the first respondent cancelled the Form II permit and thereby disabled the appellant herein from transporting the cut timber and firewood. According to the appellant he is lawfully entitled to transport the timber and firewood which he has purchased from respondents 4 to 9 and the cancellation of the Form II permits without any notice to the appellant herein is violative of the principles of natural justice, Immediately after the cancellation, the appellant has approached this Court by way of a writ and has got an order of stay and injunction restraining the third respondent herein from removing the timber and firewood. The appellant has further submitted that the persons who have sold the timber and firewood to him have not taken steps to cancel the permit and it is the alleged mandate-holder who has done the same and as such it has no effect at all.

3. The first respondent in his counter-affidavit has, *inter alia*, stated that the owners of the patta lands from whose lands the timber and firewood have been cut have requested the first respondent to cancel the permit issued in Form II and they have also stated that no further Form No. II permit should be issued in favour of the appellant herein and that is why Form No. II permit was cancelled. According to the first respondent the proper remedy for the appellant is to file an independent suit for appropriate relief and he cannot invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. It was further contended that the appellant is not the owner of the produce and also of the land and as such he has no right to ask for Form No. II perm t-Finally the first respondent contended that the right over the produce itself was cancelled by the persons who gave the right and hence the question of issuing a show cause notice by the first respondent herein does not at all arise and that the appellant should take action against the owners of the estate and not against the respondents. It was further submitted that the cancellation of the permit was in strict compliance with the Rules in force and upon the strength of the relevant records and was not in any way illegal. With these averments, the first respondent prayed for the dismissal of the writ petition.

4. The learned single Judge of this Court by his order dated 15th December, 1976, dismissed the writ petition on the ground that the period of the permit was already over and that the appellant has to invoke the jurisdiction of the civil Court for effective and efficacious remedy and not the writ jurisdiction of this Court under Article 226 of the Constitution. Aggrieved by the said order, the appellant has come forward with the present appeal.

5. Mr. C. Rajan, learned counsel appearing for the appellant submitted that inasmuch as Form No. II permit was issued in favour of the appellant herein, the cancellation of the same without notice to him is violative of the principles of natural justice. The learned counsel further submitted that the property in the timber and firewood has been sold lawfully in favour of the appellant herein and as such the cancellation of Form No. II permit to remove these goods is against all canons of natural justice. According to the learned counsel the third respondent has absolutely no right in the properties purchased by the appellant herein and that the first respondent has acted illegally in cancelling the permit on the letter sent by a mandate-holder of the land owners. Mr. K. R. Natarajan, learned counsel appearing for the first and second respondents herein submitted that as per the provisions of the Tamil Nadu Timber Transit Rules, 1968, the appellant is only an agent of the owners of the land and inasmuch as the owners of the land have written a letter asking the first respondent to cancel the Form No. II permit and have also requested the first respondent not to issue any further Form No. II permits in favour of the appellant herein, the first respondent has correctly cancelled the licence and if at all the appellant has any grievance he can seek his remedy through the civil Court for necessary relief and damages against those who have injured him. Mr. Sekhar representing Mr. Radhakrishnan, learned counsel appearing for the third respondent adopts the argument of Mr. Natarajan learned counsel appearing for the first and second respondents and submits that they have lawfully come into possession of the timber and firewood which have been sold to them by the other respondents.

6. We have carefully gone through the records in this case and also the pleadings of the respective parties. It is clear from the records that the District Forest Officer, Nilgiris in his Reference No. 14973/1972-J, dated 22nd August, 1972, has cancelled the Form No. II permit issued in the name of the appellant stating that the owners of the Estate from whose Estate they fell the trees have requested him to cancel the permit issued under Form No. II in favour of the appellant herein. Mr. Natarajan, learned counsel appearing for respondents 1 and 2

brought to our notice rule 3 of the Rules called the "Tamil Nadu Timber Transit Rules, 1968". These Rules were framed in exercise of the powers conferred by sections 35 and 36 of the Tamil Nadu Forest Act, 1882 and came into force in the year 1968. Rule 3 (*iii*) reads as follows :

"In the case of timber from private lands, markets or depot in the district and in the case of subsequent movement of imported timber referred to in sub-rule (*ii*), the permit shall be in Form No. II and shall be in print. The permits in that form shall, on application, be supplied by the Range Officer, or by any Revenue Officer not below the rank of Revenue Inspector having jurisdiction on payment of a fee calculated at the rate of Re. 1.00 per form. No other permits shall be used:

Provided that Foresters may issue Form No. II permits for removal of firewood from patta lands, subject to the condition that they may issue such permits for not more than two cart lands at a time and not more than ten cart lands in a month in respect of the some individual, on production of a certificate of ownership of his patta lands issued by appropriate revenue authority".

Reading these rules Mr. Natarajan further submitted that Form No. II permit can be issued only to the owner of patta land or to his nominee or grantee. Whatever may be the right of the appellant in respect of the trees standing on those patta lands, Form No. II permit was issued only on the letter given by the owner of the patta land in favour of the appellant herein. On 5th November, 1970, respondents 4, 5, 7 and 9 have addressed the District Forest Officer, Nilgiris Forest Division, Ootacamund requesting him to pass necessary Form No. II permits for the transport of produce of the trees in the name of Western Indian Timbers, Mettupalayam. Accordingly we find that such permits were issued starting from 26th November, 1970, in favour of the Western Indian Timbers, Mettupalayam. The records produced further make it clear that the persons who have sold the timber to the appellant have registered their objections for the issue of Form II permits in favour of the appellant herein before the District Forest Officer, Nilgiris. Finally, on 20th April, 1972, the owners of the land who are some of the respondents herein have clearly and categorically stated that they have sold the timber and firewood in favour of the third respondent herein and have requested the District Forest Officer, Nilgiris North Division, Ootacamund to grant the necessary permits to 3rd respondent for transport of timber and firewood in all species lying unremoved in the field and also obtainable from the unfelled trees in the survey fields in the Estate, since they have sold all of them to the third respondent herein. On a reading of these letters, it can be spelt out that Form No. II permit is granted either to the owner of the patta lands or to his nominee or agent. If that be so, there is no question of issuing any notice to the appellant herein before such permit is cancelled inasmuch as the owners of the patta lands themselves have requested the first respondent to cancel the permit. The proviso to rule 3 no doubt supports such an argument advanced by Mr. Natarajan. But we refrain from giving any final opinion as regards the Interpretation advanced by Mr. Natarajan on this rule 3 (*iii*) of the Tamil Nadu Timber Transit Rules, 1968, since the writ appeal can be disposed of on other grounds.

7. Mr. C. Rajan, learned counsel appearing for the appellant, in support of his contention regarding the failure of natural justice since no notice had been issued before the concellation of the permit in favour of the appellant, cited the decision reported in *Babu ram* v. *Zila Parishad*[1]. In this decision the Supreme Court has held :

"When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a

1. (1969) 1 S.C.J. 878 : (1969) 1 S. C. R. 518: A. I. R. 1969 S. C. 556.

writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law".

Before dealing with this decision, we can also refer to the decision cited by Mr. Rajan, which is reported in *P. B. Reddy* v. *State of Mysore*[1]. In this decision, the Supreme Court had occasion to consider the legality of issuing writs even in cases where the period for the permit is over. Quoting this decision, Mr. Rajan submitted that even if the period of the permit is over as on date, there is no difficulty in issuing the writ so that the appellant will be in a position to renew the same and remove the timber and firewood that are lying on the patta lands. As far as the decision in *Baburam* v. *Zila Parishad*[2], is concerned, we are afraid that the same cannot be quoted to support the contention of the appellant on the facts and circumstances of the present case. In this case it is clear that the owners of the timber and firewood who have sold them have written letters to the first respondent requesting him to cancel the Form II permit issued in favour of the appellant stating that they have sold the timber and firewood to the third respondent herein. The appellant has to establish not only his right to have the form II permit but also his proprietary right to those goods. *Prima facie* the appellant may have a strong case to agitate his right over the timber and firewood. Nevertheless, it is a disputed question of fact which can be decided only on letting in evidence. If that be so, the effective and efficacious remedy will only be by way of a suit and not through writ proceedings under Article 226 of the Constitution of India. The appellant can have the remedy of getting damages against the owners of the timber if he makes out a case that injury has been caused to him by the action taken by the respondents herein. For all these reasons we do not consider that the decision in *Baburam* v. *Zila Parishad*[2], will in any way support the contention of the learned counsel appearing for the appellant.

8. As regards the decision in *P. B. Reddy* v. *State of Mysore*[1], it is clear from the facts of the case that before the period of licence had elapsed the party in that case was able to get the benefits under that licence and that is why the Supreme Court was able to direct the grant of licence for the unexpired period. But, the facts of the present case are completely different. The permit period of Form II permits has come to an end on 30th September, 1972 aud 31st March, 1973 respectively. According to Mr. Natarajan, learned counsel appearing for the Forest Department all the trees have been carried away by the third respondent subsequent to the disposal of the writ petition since there was absolutely no stay or injunction while the writ appeal was pending before this Court.

9. Thus, from the discussion we have made above it is clear that any writ issued as at present will be futile inasmuch as the time granted in the permits has lapsed long back. Further as we have already, observed the effective and efficacious remedy for the appellant on the facts and circumstances of the present case will be by invoking the jurisdiction of the Civil Court for appropriate relief and not by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution. The learned Single Judge of this Court has correctly observed on the above lines and has dismissed the writ petition. We are in complete agreement with the said observations and findings of the learned Single Judge and as such, the Writ Appeal is dismissed. There will be no order as to costs.

R. S. —— *Writ appeal dismissed.*

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1. (1969) 1 S. C. C. 68 : (1969) 2 S. C. J. 114 : (1969) 3 S. C. R. 141 : A. I. R. 1969 S. C. 655.
2. (1969) 1 S. C. J. 878 : A. I. R. 1969 S. C. 556.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special original Jurisdiction)

PRESENT:—*S. Mohan, J.*

G. Panneerselvan ... *Petitioner**

v.

Rent Controller (VII Judge) Court of Small Causes, Madras and others ... *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 18—Petition for eviction from residential premises on grounds of arrears of rent and* bona fide *requirement for own occupation—Compromise between the parties—Two years time granted to tenant to vacate—Expiry of period—Tenant's failure to vacate—Suit by tenant in Civil Court for declaration and injunction—Suit dismissed for default—Petition seeking to set aside the* ex-parte *order of dismissal—Order of eviction put in execution—Delivery ordered—*Ex-parte *order set aside but suit dismissed on merits—Appeal by tenant—Possession except for one room taken by landlord—Appeal also ultimately dismissed on merits——Writ petition filed to quash the order of eviction—Order of eviction held valid.*

(B) *Civil Procedure Code (V of 1908), section 144—Restitution and Rent Control proceedings.*

The landlord filed a petition against the tenant, writ petitioner for eviction on the basis of the latter being in arrears of rent and the premises being required by the landlord for his own personal residential occupation. After the landlord had been examined, a compromise was entered into between the parties when the landlord offered to grant the tenant two years time. As a result of this an order of eviction was passed on 6th March, 1972. On the expiry of the period, the writ petitioner was asked to deliver possession on or before 6th March, 1974. He did not do that. He filed a suit in the City Civil Court challenging the validity of the consent order passed in the petition for eviction. The suit was dismissed for default and during the pendency of the application for its restoration, the order of eviction was put in execution and in E. P. No. 116 of 1976 delivery of possession was ordered. The suit filed in the City Civil Court was dismissed on merits. An appeal preferred against the dismisal was also ultimately dismissed on merits. During the pendency of the appeal possession of the premises except for one room had been taken by the landlord. To quash the order passed in E. P. No. 116 of 1976 the present writ petition was preferred. It was contended that (1) the order which was executed being one passed by consent was opposed to the provisions of the Rent Control Act and must be held to be void in law; (2) In so far as there was no notice before the order of eviction came to be executed, the same was bad and opposed to the mandatory provisions of Order 21, rule 22 of the Civil Procedure Code.

Held: The order of eviction cannot by any stretch of imagination be regarded as an order of compromise which the Rent Controller was incapable of passing. Besides the order was unsuccessfully challenged on the very same grounds before the Civil Court and the matter was taken up even in appeal. Having regard to the fact that there is a conclusive judgment, however erroneous it may be, binding between the parties, it would clearly constitute *res judicata*. [*Para.* 7.]

The decree here can never be considered a nullity. If the Rent Controller were to go into the merits of the order of eviction it would amount to going beyond the decree which is forbidden by law as far as the executing Court is concerned.

It is not correct that there was no notice before execution. The tenant at every possible stage had notice of the proceedings. This is strengthened by the lower appellate Court's judgment wherein the very order of eviction was questioned. It is impossible to contend that the eviction order was based on compromise without the Rent Controller being satisfied of the ground of eviction. The Rent Controller was fully empowered

*W. P. No. 781 of 1979, *4th March*, 1982.

under section 18 of the Act to pass such an order. [*Paras. 9 and* 10.]

It is a moot question whether section 144 of the Code of Civil Procedure would apply notwithstanding section 18 of the Rent Control Act in the present case. Assuming it applies, its aid for the purposes of redelivery can be invoked only when the basis of the decree is gone. Here that remains very much, all the more so when it has received the approval of the civil Court. [*Para. 13.*]

Cases referred to:—

Ferozi Lal Jain v. *Man Mal*, A. I. R. 1970 S. C. 794 ; *Nagindas Ramdas* v. *Dalpatram Icharam alias Brijram*, (1974) 2 S. C. J. 21 : (1974) 1 S. C. C. 242 : A. I. R 1974 S. C. 471 ; *Ramachandra Ayyar* v. *Ramanujachariar*, (1924) I. L. R. 47 Mad. 288 : 46 M. L. J. 104 : 19 L. W. 179 : A. I. R. 1924 Mad. 431 (F. B) ; *Natarajan* v. *M/s. Chandmull Amarchand*, (1971) 1 M. L. J. 474 : 84 L. W. 361 ; *B. V. Patankar* v. *C. G. Sastry*, (1961) 1 S. C. R. 591 : (1961) 1 S. C. J. 221 : A. I. R. 1961 S. C. 272 ; *Sunder Das* v. *Ram Prakash*, (1977) 2 S. C. J. 98 : (1977) 3 S. C. R. 60 : (1977) 2 S. C. C. 662 : (1977) R. C. J. 575 : A. I. R. 1977 S. C. 1201 ; *K. K. Chari* v. *R. M. Seshadri*, (1974) 1 M. L. J. (S C.) 14 : (1974) 1 An. W. R. (S. C) 14: (1974) 1 S. C. J. 17 : (1973) 3 S. C. R. 691 : A. I. R. 1973 S. C. 1311.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records in E. P. No. 116 of of 1976 in H. R. C. No. 29 19 of 1970 on the file of the first respondent herein and quash his orders of delivery dated 5th February, 1976 and 22nd February, 1979 and direct the first respondent-Rent Controller to order re-delivery of the entire upstairs portion at old door No. 37, New Door No. 9 Irusappa Gramani Street, Triplicane, Madras-5 to the petitioner herein.

K. Kulandaivelu, for Petitioner.

C. Lakshmi Narain, for Respondents Nos. 2 and 3.

The Court made the following

ORDER.—This writ petition illustrates how a resourceful and recalcitrant tenant can drive the landlord from pillar to post and push him to the point of exasperation. The petition for eviction in H. R. C. No. 2919 of 1970 preferred against the writ petitioner on 10th October, 1970. That was filed on the basis that the petitioner was in arrears of rent and the *bona fide* need for personal occupation of the residential premises. P. W. 1 the landlord had been examined. At that stage, a compromise was entered into between the parties, when the landlord offered to grant the tenant two year's time ; as a result of this, an order of eviction was passed on 6th March, 1972. By reason of the expiry of the two years' period, the writ petitioner (tenant) was required to deliver possession on or before 6th March, 1974. However, he did not do that. He filed O. S. No. 2276 of 1974 on the file of the learned 4th Assistant City Civil Judge, Madras. The following issues were framed for trial is that suit.

(1) Whether the consent order passed in H. R. C. No. 2446 of 1979 and H. R. C. No. 2919 of 1970 is null, void and inoperative?

(2) Whether the plaintiff is entitled to injunction?

(3) To what relief?

The suit was dismissed for default on 15th October, 1974. Thereafter, I. A. No. 25191 of 1974 in that suit was filed, seeking to set aside the *ex parte* order of dismissal. In the meanwhile, the order of eviction was put in execution and on 21st November, 1974, the executing Court ordered delivery of possession. However, on 27th November, 1974, the suit was dismissed on merits. Thereupon A. S. No. 60 of 1976 was preferred to the learned II Additional Judge, City Civil Court, Madras. During the pendency of the appeal on 16th February, 1976 possession, excepting for one room, was taken by the landlord-respondent herein. On 26th February. 1976 C. M. P. No. 719 of 1977 was filed for the transfer of the appeal, which was originally pending before the learned I Additional City Civil Judge, Madras, to another Court. On 29th

July, 1977, transfer of the appeal was ordered. On 21st January, 1976, the appeal A. S. No. 60 of 1976 was dismissed for default. C. M. P. Nos. 37 and 38 of 1978 were filed for restoration of the appeal and for stay. The application for injunction was dismissed in C. M. P. No. 52 of 1979. On 11th April, 1978, again the appeal was dismissed for default notwithstanding the earlier restoration. Thereafter, C. M. P. No. 261 of 1978 was filed for restoration of the appeal on 12th June, 1978. On 26th March, 1979 the appeal was dismissed with costs on merits.

2. In E. P. No. 116 of 1976 the following orders came to be passed:

Orders : 6-2-76 : Deliver 8-3-76		Inld. M. S. VII Judge, 5-2-76.
8-3-76 Petition-Call on 17-3-76	Inld.	M. S. VIII Judge, 8-3-76.
17-3-76 Call on 23-3-76		- do - 17-3-76
23-3-76 Call on 8-4-76		- do - 23-3-76
8-4-76 Call on 26-4-76		- do - 8-4-76
26-4-76 Call on 19-6-76		- do - 26-4-76
19-6-76 Call on 13-7-76		- do - 19-6-76
13-7-76 Call on 22-7-76		- do - 13-7-76
22-7-76 Call on 12-8-76		22-7-76
Call on 2-9-76		Dt. 12-8-76
Call on 24-9-76		Dt. 2-9-76
Call on 15-10-76		Dt. 24-9-76
Call on 5-11-76		Dt. 15-10-76
Call on 27-11-76		Dt. 5-11-76
Call on 22-12-76		Dt. 27-11-76
Call on 11-1-77		Dt. 22-12-76
Call on 1-2-77		Dt. 11-1-77
Call on 24-2-77		Dt. 1-2-77
Call on 14-3-77		Dt. 24-2-77
Taken up today. Deliver 16-2-78	Inld.	KSV VIII Judge 30-1-78
Call with MPs 17-2-78		- do - 16-2-78
Call on 27-2-78		- do - 17-2-78
Call on 2-3-78		- do - 27-2-78
Call on 3-8-78	Inld.	T. T. VIII Judge 20-7-78
Call on 18-8-78		- do - 3-1-78
Call on 24-8-78		- do - 18-8-78
Call on 30-9-78	Inld.	T. T. VIII Judge 21-9-78
Call on 21-10-78	Inld.	V. R. VIII Judge, 30-9-78
Call on 18-11-78	Inld.	V. R. 21-10-78
Call on 9-2-78		- do - 3-2-79
Call on 6-2-79		- do - 5-2-79
Call on 7-2-79		- do - 6-2-79

Call on 8-2-79	- do - 7-2-79
Call on 9-2-79	- do - 8-2-79
Call on 12-2-79	- do - 9-2-79
Call on 13-2-79	- do - 12-2-79
Call on 22-2-79	- do – 13-2-79

22-2-79 : M. P. 413/76, M. P. 1133/76, M. P. 396/76 and M. P. 1586/78 dismissed to-day. Delivery by 19-3-79.

Thereupon M. P. No. 413 of 1976 in H. R. C. No. 2919 of 1970 was filed and the following orders were passed

Notice 3/3 IIId.	M. S. VII Judge 1-3
T. R. 8/3 IIId.	M. S. VII Judge 3/3
Notice taken, counter 17/3 IIId.	M.S. VII Judge 17/3.
Call on 8/4	- do - 2/3
Call on 26/4	- do - 8/4
Call on 19/6	- do - 26/4
Call on 13/7	19/6
Call on 22/7	- do - 13/7
B. N. R. 31/7 IId.	M. S. VII Judge. 22/7
B. N. R. 12/8 IId.	M. S. VII Judge 31/7
Call on 2-9-76 - do -	12-8-76
Further arguments heard in full. Exs. P-1 to P-17 marked. Affidavit received.	Respondent reply 2-8-77. IId. N. C. VIII Judge 1-8-77

22-2-79

ORDER

M. P. 1133/76 filed by the petitioner under section 47, Civil Procedure Code, to declare the order of eviction null and void and dismiss the eviction petition is dismissed today. The order of eviction passed in the H. R. C. has not been reversed or set aside or modified or altered in any appeal or revision or in any other proceedings and the petitioner cannot invoke the provision of section 144, Civil Procedure Code, to order re-delivery of the portion of the property already delivered. This petition is liable to be dismissed.

In the result, this petition is dismissed. No costs".

3. Again, M. P. No. 133 of 1976 was filed and on 22nd February, 1979, the following order was passed.

4. "The point for consideration is to what relief the petitioner is entitled.

Point.—The petitioner herein filed a suit in O. S. No. 227 of 1974 as against the respondents/landlords on the file of City Civil Court, Madras, to declare the orders of eviction passed in the present H. R. C. as null, void and inoperative. All the points raised in the present petition have been raised in the suit and the suit was ultimately dismissed. This Court is bound by the judgment and decree of the City Civil Court in O. S. No. 2271 of 1974 and the same grounds cannot be agitated once again by the petitioner herein.

5. Moreover the order passed in the H. R. C. by the Rent Controller by no stretch of imagination, can be termed as non-speaking and an invalid order. The Rent Controller has framed the necessary points for consideration and after analysing the evidence tendered before the Court answered the points in favour of the landlords; ultimately an order of eviction was passed. It is meaningless to contend that the order was by the Rent Controller without applying his mind. The executing Court is not an appellate authority to canvass the correctness of the decision taken by the Rent Controller. The decisions relied on by the petitioner do not apply to the facts of the present case. The execution petition has been launched on the strength of the order by the Rent Controller, which is valid and executable. This Court properly ordered delivery and the same is not liable to be set aside. The execution petition cannot be dismissed for the untenable grounds raised in the petition. The petitioner is not entitled to any relief and the petition is liable to be dismissed. I answer this point against the petitioner.

In the result, this petition is dismissed. No costs.

IId V. R. VII Judge,
22-2-1979.

6. It is to quash the order passed in E. P. No. 116 of 1976 that the present writ petition is preferred. The following points are urged for consideration in support of the prayer in the writ petition :

(1) The order which was executed, was passed by consent and such order in the teeth of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 must be held to be void in law. In support of this submission the learned counsel for the petitioner relied on the rulings reported in *Ferozi Lal Jain* v. *Man Mal*[1], and in *Nagindas Ramdas* v. *Dalpatram Iccharam* alias *Brij Ram*[2]. The second conteetion urged by the petitioner is that in so far as there was no notice before the order of eviction came to be executed, the same is clearly bad and opposed to the mandatory provisions under Order 21, rule 22 of the Code of Civil Procedure, and such execution would be a nullity, as laid down in the decisions reported in *Ramachandra Ayyar* v. *Ramanujachriar*[1], and in *Natarajan* v. *M/s. Chandmull Amarchand*[2], where the possession had been taken pursuant to an order of nullity without notice to the petitioner, re-delivery can be ordered. As laid down in the decisions reported in *B. V. Patankar* v. *C. G. Sastry*[3], and in *Sunder Dass* v. *Ram Prakash*[4], it is only under section 47 of the Code of Civil Procedure, during the execution stage, these points can ever be urged by the petitioner and the fact that the suit and further appeal thereon came to be filed, is not a bar to raise these points before the executing Court. Therefore, the impugned order is liable to be quashed.

7. Per contra, it is argued by the learned counsel for respondents 2 and 3 that it is impossible to think that the basis of eviction was a compromise. The landlord was examined and the matter stood adjourned for further examination. At that stage when an offer of two years period was made, the tenant seized the same and agreed to have the order passed. It is not correct to contend that such an order is a nullity. As a matter of fact, the Supreme Court itself pointed out in *K. K. Chari* v. *R. M. Seshadri*[5], that such an order is perfectly valid. In *Ferozi Lal Jain* v. *Man Mal*[6], the decision came to be rendered, because there was no material to show that there was satisfaction on the part of the Rent Controller, which alone would confer on him the jurisdiction to pass an order of eviction.

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1. A. I. R. 1970 S. C. 794.
2. (1974) 1 S. C. C. 242 : (1974) 2 S. C. J. 21 : A. I. R. 1974 S. C. 471.

1. (1924) I. L. R. 47 Mad. 288 : 46 M. L. J. 104 : 19 L. W. 176 : A. I. R. 1924 Mad. 491 (F. B).
2. (1971) 1 M. L. J. 474 : 84 L. W. 361.
3. (1961) 1 S. C. J. 221 : (1961) 1 S. C. R 591 : A.I. R. 1961 S C. 572.
4. (1977) 2 S. C. J. 98 : (1977) 3 S. C. R. 60 : (1977) 2 S. C. C. 662 : (1977) R. C. J. 575 : A. I. R. 1977 S C. 1201.
5. (1974) 1 M. L. J. (S. C) 14 : (1974) 1 S. C. J. 17 : (1974) 1 An W. R. (S. C) 14 : (1973) 3 S. C. R 691 : A. I. R. 1973 S. C. 1311.
6. A. I. R. 1970 S. C. 794.

As a matter of fact, in *Nagindas Ramdas* v. *Dalpatram Iccharam*[1], the Supreme Court (in paragraph 26) has succinctly stated the entire law thus :

> "From a conspectus of the cases cited at the bar, the principle that emerges is that if at the time of the passing of the decree, there was some material before the Court, on the basis of which the Court could he *prima facie* satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made "by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admission. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong".

Looked at on this basis, the order cannot by any stretch of imagination, be contended to be an order of compromise which the Rent Controller is incapable of passing. Besides, the order of eviction was unsuccessfully challenged on the very same grounds before the civil Court and the matter was taken up even in appeal. Under those circumstances having regard to the fact that there is a conclusive judgment, however erroneous it may be, binding between the parties, it would clearly constitute *res judicata*. Therefore, apart from the fact that it is not an order based on compromise, it is a well considered order by the Rent Controller, and further the Civil Court has put a seal of approval on this order and therefore, that would be conclusive and binding between the parties.

8. No demur can be taken to the proposition of law that re-delivery could be ordered if the decree itself is a nullity. But, here the decree can never be contended to be a nullity. Then again if the Rent Controller were to go into the merits of the order of eviction, it would amount to going beyond the decree which is clearly forbidden by law as far as the executing Courts are concerned. It is a moot question whether section 144 of the Code of Civil Procedure would apply to rent control proceedings notwithstanding section 18 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Assuming that it applies, the aid of that section for the purpose of re-delivery can be invoked only when the basis of the decree is gone. Here that remains very much, all the more so when it has received the approval of the civil Court.

9. It is not correct to contend that there was no notice before execution. As a matter of fact, the tenant at every possible stage had notice of the proceedings. He had driven the landlord almost from pillar to post and such a contention at this belated stage could never be accepted. If, therefore, there was notice, the rulings reported in *Rajagopala Ayyar* v. *Ramachandra Ayyar*[1], and in *Sunder Dass* v. *Ram Parkash*[2], would not be relevant for the question in issue.

10. I have given careful consideration to the above argument relating to want of notice. I have at the outset of the judgment characterised the attitude of the tenant. That is further strengthened when we have looked into the appellate Court's judgment wherein the very order of eviction was questioned. In paragraph 11 of the Judgment in A. S. No. 6

1. (1974) 2 S. C. J. 21 : A. I. R. 1974 S. C. 471.

1. (1924) I. L. R. 47 Mad. 298 : 46 M. L. J. 104 (F. B.).
2. (1977) 2 S. C. J. 98 : (1977) 2 S. C. C. 662 : A. I. R. 1977 S. C. 1201.

of 1976, the learned Judge points out as follows :

"The plaintiff then raised a contention that he was not allowed to cross-examine the first defendant (as P. W. 1) by the Rent Controller and hence there has been a violation of the principles of natural justice and consequently the order of the Rent Controller is void. This argument, appears to me, is an entire misrepresentation of what must have happened before the Rent Controller. It should be remembered as is disclosed by Exhibit A-2 that the first defendant had been examined on a particular day and further examination had been postponed to a subsequent date, (6th March, 1972) on which date he was further examined and on which date the parties made a joint endorsement also signed by themselves and their counsel. In the circumstances, it is but natural that the plaintiff did not even think of cross-examining P. W. 1 on any of the matters he had spoken about. I think it would be wholly incorrect to suggest that the plaintiff was not allowed to cross-examine the witness. No doubt, the plaintiff points out that in Exhibit A-2 there is "no note either that the plaintiff did not cross-examine the witness or that he did not want to cross-examine the witness. But equally so, it should be noted, that there is no note that the plaintiff wanted to cross examine the witness but was prevented from doing so. It should be remembered that the plaintiff is an advocate with several years of practice and is, in fact, actively practising before the Rent Controller as well as other Courts in Madras.

In the circumstances, it is wholly inconceivable that he would have wanted to exercise a right of cross-examination but was prevented from doing so. Therefore, this ground of attack also does not appear to be correct or valid".

The above extract clearly sums up as to what happened before the Rent Controller. Therefore, it is impossible to contend that the order of eviction is based on compromise without the Rent Controller being satisfied of the ground of eviction. As a matter of fact, the order is in the following terms :

"I am satisfied with the evidence of P. W. 1 which show that the respondent's denial of title is not *bona fide*, that the respondent has committed wilful default from March, 1966 and that the requirement of the petitioners in respect of the respondent's premises is *bona fide*". He had, therefore, answered the points for consideration in favour of the petitioners and had allowed the petitions ordering eviction of this plaintiff. It, therefore, would *prima facie* be incorrect to state that the learned Rent Controller had not applied his mind and had not subjectively satisfied himself with the fulfilment of the conditions requisite under Act XVIII of 1960 before ordering eviction".

11. I am satisfied that the order puts beyond every doubt that it was passed on a valid basis for eviction. In *Ferozi Lal Jain* v. *Man Mal*[1], there was no satisfaction by the Rent Controller which is clearly in violation of the terms of the statutory enactment. Here it is not so. Therefore, that ruling is clearly distinguishable. The decision in *Nagindas Ramdas* v. *Dalpatram Iccharam*[2], (paragraph 26 already extracted) points out the correct legal position. The order of eviction referred to above squarely falls under the ratio of this ruling. To the same effect is the ruling in *K. K. Chari* v *R. M. Seshadri*[3], which has been referred to in the decision just cited.

12. Nobody can have quarrel with the proposition that where execution had taken place under a void decree, re-delivery could be ordered. This is exactly the ratio laid down in *B. V. Patankar* v. *C. G. Sastry*[4]; but that ruling has absolutely no bearing on the facts of the present case, because that is a case where the decree of the civil Court was executed when there was a bar on the jurisdiction of the civil Court from bypassing the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act. That is not the position here, because the

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1. A. I. R. 1970 S C. 794.
2. (1974) 2 S. C. J. 21 : A. I. R. 1974 S. C. 471.
3. (1974) 1 M. L. J. (S. C) 14 : (1974) 1 An. W. R. (S. C) 14 ; (1974) 1 S. C. J. 17.
4. (1961) 1 S. C. J. 221 : A. I. R. 1961 S. C. 272.

order that is sought to be executed was only that of the Rent Controller. I may say at this stage that the Rent Controller will be empowered under section 10 of the Act to pass such an order. Equally, the ruling reported in *Sunder Dass* v. *Ram Prakash*[1], will have no application to the present case. It is a moot question whether section 144 of the Code of Civil Procedure would apply to the present case. I say so notwithstanding section 18 of the Act, which is to the following effect. Assuming that it applies, what is the basis for such application to seek re-delivery? In my considered view, the order of eviction will stand and that is approved by the civil Court not once but twice because all the points that were urged before me were unsuccessfully urged in O. S. No. 2271 of 1974, followed by an appeal in A. S. No. 60 of 1976, on the file of the II Additional City Civil Judge, Madras. Therefore, the application for re-delivery itself, in my view is misconceived.

13. I am totally unable to accept the argument of the learned counsel for the petitioner that there was lack of notice before execution, as the above narration will disclose that at every stage the writ petitioner had notice. Therefore, neither the ruling in *Rajagopala Ayyar* v. *Ramachandra Ayyar*[2], nor the ruling in *Natarajan* v. *M/s. Chandhulal Amarchand*[3], would apply to the facts of the present case.

14. In the result, I hold that the writ petition is totally devoid of merits and it is accordingly dismissed with costs. Counsel's fee fixed at Rs. 250 payable to respondents 2 and 3.

R. S. —— *Petition dismissed.*

1. (1977) 2 S. C. J. 98 : A. I. R 1977 S. C. 1201.
2. (1924) I. L. R 47 Mad. 288 : 46 M. L. J. 104. (F. B.)
3. (1971) 1 M. L. J. 474 : 84 L. W. 361.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and G. Maheswaran, J.*

Tamil Nadu Wakf Board represented by its Secretary, K. T. Fakir Ahmed

... *Appellant**

v.

S. Syed Imam Saheb and another

... *Respondents.*

Wakf Act (XXIX of 1954), sections 3 (1) and 66 (c)—Non-Muslim whether can create a wakf as defined in the Act— Grant by Hindu King for purposes of fakkis resorting to darga—Nature of—'Wakf' and 'deemed wakf'—Definition of—Scheme for administration of darga framed by the Court —Sanction obtained from civil Court for leasing a small part of concerned property—Whether sufficient—Application under section 36-A of the Act, if necessary.

As per the definition of 'wakf' in section 3 (1) of the Wakf Act, 1954, it is only a permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable that will constitute a wakf. When a property granted by a Hindu Ruler, has been shown to have been used for pious, religious or charitable purposes, it cannot be taken to be a wakf, coming under section 3 (1) *(iii)* of the Wakf Act. The fact that section 66 (*c*) of the Act deals with certain donations made by non-Muslims as "deemed wakf" will clearly indicate that the dedication made by a non-Muslim will not come within the definition of a 'wakf' occurring in section 3 (*1*). The inclusive clause will not whittle down or reduce the effect of section 3 (1). The legislature has treated under section 66 (*c*) of the Act donations or dedications made by non-Muslims for certain stated objects as "deemed wakf" and this will clearly indicate that dedication by non-Muslims will stand excluded from the definition of section 3 (1) of the Act. [*Para.* 12.]

*A. No. 674 of 1977. *16th March,* 1982

The suit property was granted by a Hindu Ruler to fakkirs visiting a mosque. It cannot be taken to be a 'wakf' as defined in section 3 (1) of the Wakf Act nor can it be taken to be a 'deemed wakf' as defined in section 66 (*c*) of the Act. Such being the true legal position the provisions of the Wakf Act including section 36-A will not apply to the suit property. Therefore no sanction under sanction 36-A for leasing out the property either for agricultural or non-agricultural purposes is necessary. [*Para.* 12]

The concerned dargah, mosque as well as the suit property are being administered under a scheme decree framed by the civil Court. As per the terms of the said scheme, the first defendant had obtained the sanction of the civil Court for leasing out the property and in pursuance of the said sanction the suit property had been leased to the 2nd defendant. The suit property would not constitute wakf property under section 3 (1) or a deemed wakf under section 66 (*c*).

The question as to whether the Wakf Board can go behind the scheme does not arise. There is no specific provision in the Act putting an end to the scheme already framed by the civil Court or to nullify the same; the scheme-decrees passed by the civil Courts in relation to certain wakfs should be taken to continue to be in force unless, the wakf succeeds in cancelling the scheme decree by approaching the civil Court. The general power of superintendance of the Wakf Board over all wakfs under section 15 of the Wakf Act, will not enable the Wakf Board to interfere with the scheme framed by the civil Courts. [*Para. 19.*]

Cases referred to:—

Venkata Subbarayalu v. *Silar*, 58 M. L. J 524: 31 L. W. 396 : A. I. R. 1930 Mad. 582 ; *Peeran Sahib* v. *Madras State Wakf Board*, 80 L. W. 67 : (1967) 1 M. L. J. 425 : I. L. R (1968) 1 Mad. 89 ; *Madras State Wakf Board* v. *Khazi Mohideen Sheriff*, (1974) 1 M. L. J. 253 : 87 L. W 375 : A. I. R. 1974 Mad. 255 ; *Palai Muslim Dharmaparipalana Sangam* v. *Wakf Board*, (1975) 1 M L. J. 201.

Appeal against the decree of the Court of the Subordinate Judge, Thanjavur, dated 30th August, 1976 in Original Suit No. 39 of 1975.

F. A. Rasheed, for Appellant.

M. Ramachandran, *S. Ramalingam*, *R. Mohan and N. Thiagarajan*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—An interesting question of law as to whether a non-Muslim can create a wakf as defined in the Wakf Act, 1954 arises in this appeal filed by the plaintiff, the Tamil Nadu Wakf Board, in O. S. No. 39 of 1975 on the file of Sub Court, Thanjavur.

2. The appellant filed the said suit, for recovery of vacant possession of the suit property, claiming it to be a wakf property. Its case as set out in the plaint was as follows :

3. The suit property belongs to Hazarath Sham Mansoor Avulia Dargah at Thanjavur and it is one of the several properties endowed for the maintenance and support of the said Dargah. The said Dargah is a notified wakf. In O. P. No. 41 of 1971 the Dargah has been declared as a wakf by the Sub Court, Thanjavur. The suit property is close to the Dargah and had been used hitherto as burial ground and for purposes connected with the Urs festivals of the Dargah and therefore, it has also become a wakf by user from time immemorial. The suit property has been leased out to the 2nd defendant, by the 1st defendant, who is the secretary of the Board of Trustees of the said Dargah, for a period of 25 years for erecting a permanent cinema theatre, by an agreement dated 7th May, 1971, without obtaining the sanction from the plaintiff, as required under section 36-A of the Wakf Act. The said lease, without such sanction, is invalid, as it is for a non-agricultural purpose for a period exceeding one year. Hence, the said lease is void and the 2nd defendant's possession of the suit property is illegal and wrongful. The said lease also will not bind the Wakf Board. The plaintiff is therefore entitled to recover

vacant possession of the land ignoring the lease deed in favour of the 2nd defendant, treating him as a trespasser.

4. The suit was resisted by both the defendants. The first defendant, who is the Secretary of the Board or Trustees, of the said Dargah, contended that the suit land is not being used as a burial ground. The suit property is not a wakf. It is a charitable endowment granted by a Hindu king by name Sevappa Naicker for the purpose of Fakirs resorting to the Dargah and therefore, it will not come under the definition of 'wakf'. The administration of the Dargah is governed by a scheme framed by the civil Court in O. S.No. 11 of 1941 on the file of Sub Court, Thanjavur. In O. P. No. 41 of 1971, the wakf Board sought directions from the Court to the trustees to register the trust as a wakf, submit annual reports, pay contributions and get permission of the Wakf Board before constructing any building in T. S. No. 2980 belonging to the Trust. However, this petition was dismissed on 7th July, 1971, on the objections of the Board of trustees. The lease in favour of the 2nd defendant, which has been impugned by the plaintiff, has been after obtaining the sanction of the Court in I. A. No. 288 of 1971, wherein the terms and conditions of the lease were also approved by the Court. On the strength of the said lease, the second defendant has constructed a theatre at a huge cost of Rs. 3 lakhs. The trust is getting a monthly assured income from the property demised. The lease is not only valid but also beneficial to the trust. The existence of the theatre is not a hindrance to any of the religious functions performed in the dargah. In any event, the property leased out in favour of the 2nd respondent is a small piece of land in the eastern extremity, out of the entire area of 6-¾ acres belonging to the trust.

5. The second defendant, though filed a separate written statement, has practically adopted the same averments as found in the written statement of the first defendant. He has added that he had invested a large amount in the construction of the cinema theatre relying on the orders of the Court sanctioning the lease and to the knowledge of the plaintiff and therefore, the plaintiff is estopped from challenging the lease in his favour.

6. On these pleadings, the two substantial questions that arose for consideration by the lower Court were:—

1. Whether the lease deed, dated 7th March, 1971, granted by the 1st defendant in favour of the 2nd defendant is invalid and not binding on the plaintiff as alleged in the plaint ?

2. Whether the sanction obtained by the 1st defendant from the Sub Court, Thanjavur, in I. A. No. 288 of 1971 in O. S. No. 11 of 1941 on the file of the same Court, will validate the said lease?

7. On these questions, the Court below held that the suit property is not a wakf property and therefore, no sanction under section 36-A of the Wakf Act, 1954, is necessary for leasing out the property and that the sanction obtained from the civil Court, in pursuance of the Scheme, for leasing out the property to the 2nd defendant is sufficient to sustain the validity of the lease deed in question. In this view, the Court below dismissed the plaintiff's suit.

8. In this appeal, the appellant, Wakf Board, challenges the findings of the Court below that the suit property is not a wakf property and that therefore, no sanction under section 36-A of the Wakf Act for leasing out the suit property in favour of the second defendant is necessary. It is also contended on behalf of the appellant that notwithstanding the scheme decree in O. S. No. 11 of 1941 relating to the administration of the Dargah in question, as also the sanction granted by the civil Court for granting the lease in favour of the 2nd defendant, since the scheme is to be read subject to the provisions of the Wakf Act, a sanction under section 36-A of the Wakf Act is a must.

9. The learned counsel for the Board of Trustees, the 1st respondent herein, contends that the suit property is not a wakf property, as it has been donated by a person professing Hindu faith, which stands excluded from the definition of 'wakf' in section 3 (1) of the Wakf Act, that even if the property is held to be a wakf property, still the administration of the same, has to be in accordance

with the terms of the scheme decree, and that in this case, the sanction has been obtained for leasing out the property from the civil Court in pursuance of the terms of the scheme decree. The lease in any event cannot be taken to be invalid. It is also pointed out by the learned counsel that schemes framed before the enactment of Wakf Act, 1954, cannot be taken to have been superseded by the provisions of the Wakf Act and that the Wakf Board, even if the suit property is taken to be a wakf property, is bound by the terms of the scheme and it cannot overlook or supersede any of the terms of the scheme decree framed by the Court.

10. In the face of the relative contentions of the parties, two questions that arise for consideration, are :-

(1) Whether the suit property is a wakf property as defined in the Wakf Act, so as to attract the provisions of the Wakf Act?

(2) If it is a wakf property, whether the sanction obtained from the civil Court as per the scheme decree for leasing out the property in favour of the 2nd defendant is sufficient, or, whether an application under section 36-A of the Wakf Act is necessary to sustain the validity of the lease deed?

11. In this case, the relevant facts are not in controversy. The suit property is part of T. S. No. 2953, which has been granted in favour of the Fakkirs vistiting the Mosque by certain five persons on the direction of a Hindu King called Sevappa Naicker, a Ruler of Thanjavur kingdom between 1532 and 1580 A. D., as a representative of the Emperors of Vijayanagar. The property so dedicated, measured seven velis of land. Some portions of the land dedicated, had been acquired by the railways and for other Government purposes and the balance left is an extent of 6-1/3 acres. The eastern extremity of the said land measuring 84,375 sq.ft. has been given on a long lease for 25 years by the 1st respondent in favour of the 2nd respondent, after obtaining the sanction of the civil Court in pursuance of the scheme decree. In relation to the dargah, a scheme has been framed by the civil Court in O. S. No. 11 of 1941 on the file of Sub Court, Thanjavur and the dargah is being administrated by a Board of trustees, of which the 1st respondent herein is the Secretary, under the terms of the terms of the scheme decree. Since the scheme decree provided for leasing out the properties in management of the Board of Trustees after obtaining the sanction of the Court, the Board of trustees sought for and obtained sanction to lease out the suit property in favour of the 2nd respondent for erecting a cinema theatre in I. A. 288 of 1971 in O. S. No. 11 of 1941. On the basis of the said sanction granted by the civil Court, the first respondent has leased out the suit property to the 2nd respondent by a document Exhibit A-2, dated 7th May, 1971. On the faith of the said lease, the second respondent has put up a theatre in the lease-hold property. It is at this stage, the plaintiff has come forward with the present suit for recovery of vacant possession of the suit property from defendants 1 and 2, on the ground that the lease granted in favour of the 2nd respondent was void, invalid and inoperative, as no sanction has been obtained from the Wakf Board under section 36-A of the Act and that the use of the suit property for a non-agricultural purpose, such as erecting a theatre, interferes with the other normal functions in the dargah. On these facts, which are not in dispute, the legal question as to whether the suit property is a wakf property and whether the sanction under section 36-A of the Wakf Board, is necessary to sustain the validity of the lease, has to be considered.

12. A wakf property has been defined in section 3 (1) of the Wakf Act, 1954, as follows:

> (1) "Waqf" means the permenent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes—
>
> (*i*) a wakf by user;
>
> (*ii*) grants (includes *nashrut-ul-khidmat*) for any purpose recognised by the Muslim law as pious, religious or charitable"

As per the above definition, it is only a permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim

law as pious, religious or charitable, that will constitute a wakf. However, according to the learned counsel for the appellant, any grant made by any Ruler for any purpose recognised by Muslim law, as pious, religious or charitable will come under the definition of 'wakf', though such Ruler may be a person not professing Islam, if the property has been used for any pious, religious or chairtable purposes, it can be taken to be a wakf by user. Therefore, if a property granted by a Hindu Ruler, has been shown to have been used for pious, religious or charitable purposes, it should be taken to be a wakf, coming under section 3 (1) (*iii*) of the Wakf Act. However, we are not inclined to agree with the submission of the learned counsel that even dedications made by a non-Muslim, for purposes recognised by the Muslim law, as pious, religious or charitable, will come under the definition of section 3 (1) of the Wakf Act (hereinafter referred to as 'the Act'), having regard to the fact that section 66 (*c*) of the Act refers to donations or dedications made by a non-Muslim of movable or immovable property for certain a stated purposes, as a 'deemed wakf.' The fact that section 66 (*c*) of the Act deals with certain donations made by non-Munlims, as a 'deemed wakf' will clearly indicate that the dedication made by a non-Muslim will not come within the definition of 'wakf' occurring in section 3 (1) of the Act. We are also not inclined to agree with the learned counsel for the appellant that the inclusive clause will whittle down or reduce the effect of the main clause, which specifically states that a dedication by a person professing Islam alone will be treated as a Wakf. The Legislature has treated under section 66 (*c*) of the Act donations or dedications made by non-Muslims for certain objects, as deemed wakf and this will clearly indicate that dedication by non-muslims will stand excluded from the definition of section 3 (1) of the Act.

13. The same view has been taken by a Division Bench of this Court in *Madras State Wakf Board* v. *Khazi Mohideen Sheriff*[1]. In that case, a similar question as to whether there can be a creation of a wakf by a non-Muslim arose. The Court, after referring to section 3 (1) of the Act, expressed the view that the main part of the definition in section 3 (1) makes it clear that the dedication should be by a Muslim and then only the property donated could be a wakf. In order to make a dedication a wakf, it should be (1) by a Muslim, and (2) for any of the purposes recognised by the Muslim law, as pious, religious or charitable, that the items mentioned in clauses (*i*) to (*iii*) in the latter part of the section, which gives the inclusive the inclusive definition should also come within the general clause in the first part of the section, which refers to the purpose of the dedication and also to the dedication being made by a Muslim. The Bench was also of the view that the very introduction of section 66 (*c*) of the Act by the amendment would go to show that unless a grant made by a non-Muslim comes under any of the clauses mentioned therein it would not be a wakf and that therefore, a dedication made by a non-Muslim, even if it is for the purposes contemplated under section 3 (1) would not be a wakf, unless it falls under section 66 (*c*), when the dedication will be taken to be a 'deemed wakf'. But for section 66 (*c*) of the Act, which applies the Act to certain grants made by non-Muslims, no dedication made by a non-Muslim would be part of wakf property, and a plain reading of section 66 (*c*) indicates that it does not contemplate a non-Muslim creating a wakf himself, though under that section, he can donate property to an already existing wakf and that too, if the wakf is one coming under any of the three clauses mentioned therein.

14. The learned counsel for the appellant would however refer to a Bench decision in *Venkata Subbarayulu* v. *Silar*[1] as supporting his stand, that even a non-Muslim can create a wakf. In that case, there was an endowment by a non-Muslim Zamindar publicly made and recognised by the Government. The question arose, whether the said endowment was valid. Wallae, J., has expressed his view in the following words :—

> "It is not uncommon for persons like Zamindars, Mittadars etc. in whose estates there are Mahomedan as well as Hindu inhabitants, to make endowments of property for Mahomedan institutions and such endowments, so far as I know, have always been

1. (1974) 1 M. L. J. 253 : 87 L. W. 375 : A. I. R. 1974 Mad. 225.

1. (1930) 58 M. L. J. 524 : 31 L. W. 396 : A. I. R 1930 Mad. 582.

accepted by the donee as valid. The present endowment was publicly made by the Zamindar and publicly recognised by Government in the inam proceedings and I should hesitate to declare it invalid merely on a presumption that there could be no exception of any kind to the rule of Mahomedan law that no wakf can be endowed by a non-Mahomedan."

The question that came for consideration in that case, was whether the endowment was valid or not. The question whether such an endowment, though valid, is a wakf, as recognised by the Mahommedan law, did not arise for consideration, and therefore, the said decision cannot be taken as an authority for the proposition that a non-Muslim also can create a wakf. Even assuming that the said decision is relevant on the question, it is significant to note that the said decision does not refer to the definition of wakf, as defined in section 2 (1) of the Mussalman Wakf Validating Act (VI of 1913), which refers to a dedication by a person professing mussalman faith, for any of the religious, pious or charitable purposes, recognised by the Muslim law as constituting a wakf.

15. The learned counsel for the appellant then refers to section 474 of Tyabji's Muslim law which deals with wakf. In the foot note, the author has noted as follows :—

> "The requirement of a valid wakf is a substantial dedication of the usufruct of the property to charitable, religious or good purposes as understood in the Muhammadan law ; no particular form is necessary ; a wakf may be construed from Royal grants of properties made in favour of individual persons as long as it was for a perpetual religious, charitable or good purposes....."

Reference was also made to sub-section (7) of section 475 of the same book, as indicating that the royal or Government grants should come under the definition of wakfs in section 3 (*i*) (*ii*). The passage relied on is as follows:—

> "In Government grants notwithstanding the use of words like *Inam* and *Altamsha* and the mention of individual petitioners as grantees, if the grants are clearly for maintaining a charitable institution, the wakf will be established".

He also cited the reference to sub-section 1 (*b*) of section 475, as indicating that wherever the land is endowed to poor, it is a wakf.

16. We do not see how these passages in Tyabji's Muslim Law, referred to above, will show that a non-Muslim can create a wakf. In the passages, referred to above, the author has mainly emphasized the purposes for which a dedication can be made and whether it will satisfy the pious, religious or charitable purposes, contemplated by the Muslim law for the creation of a wakf. The passages do not refer to the religion of the donor. When the definition section specifically refers to a dedication made by a Muslim alone as coming under the definition of wakf, we do not see how anyone could say that a wakf can be created by a non-Muslim. We are not inclined to agree with the learned counsel for the appellant that the word 'grant' occurring in section 3 (1) (*ii*) of the Act should refer to grants made by a Ruler or Government and as such they should automatically come under the definition of wakf. As already pointed out, the inclusive definition referring to the three categories, will have to also satisfy the two requirements set out in the main clause of section 3 (*i*), *i. e.* (*i*) that the dedication should be by a Muslim and (2) that the object for which the dedication has been made, should be for purposes recognised by Muslim Law, as pious religious or charitable. If really all the grants made by non-Muslims could be taken as coming under section 3 (1) (*ii*), then there is no necessity for a separate provision to deal with the grants or dedications made by non-Muslims under section 66 (C) of the Act. Then the further question is, whether the grant in this case under Exhibit B-2 can be taken to be a deemed wakf under section 66 (C).

17. Section 66 (C) of the Act has come up for consideration before this Court on two earlier occasions. In *Peeran Sahib* v. *Madras State Wakf Board*[1], a Division Bench of this

1. (1967) 80 L. W. 67 ; 1 M. L. J. 425 ; I. L. R. (1968) 1 Mad. 89.

Court held that that section contemplates the existence of a wakf and that gift being made to such existing wakf, and that under that section the limitation provided for in section 3 (1) of the Act that the creator of a wakf should be a person professing Islam is removed only to a restricted extent under section 66 (*c*) of the Act. According to the learned Judges in that case, while a non-Muslim cannot create a wakf himself under section 3 (1) of the Act, a grant in support of an existing wakf can be made by a non-Muslim in cases coming under section 66 (*c*) of the Act. They have further observed that when the definition in section 3 (1) and section 66 (*c*) of the Act are read together, it is clear that for founding a wakf under the provisions of the Act, in the first instance, *i. e.* for the original foundation, the creator must be a person professing Islam and that the statute has certainly, for understandable reasons, excluded the original foundation by non-Muslims from the operation of the Act.

18. In *Madras State Wakf Board* v. *Khazi Mohideen Sheriff*[1], which has already been referred to the scope of section 66 (*c*) has been dealt with. The Court has observed therein as follows:—

> "A plain meaning of section 66 (*c*) indicates that it does not contemplate a non-Muslim creating a wakf himself. He can donate property to an already existing wakf and that too if the wakf is one coming under any of the three clauses mentioned in that section. As we have already said, the grant in this case is for Kazi Service. Kazi service which would be a mushrut-ul-khidmat is not one of the wakfs mentioned in any one of the three clauses in section 65(*c*)".

As regards the scope of section 66 (*c*), we are in entire agreement with the view expressed in the above two decisions. In this case, the dedication, as already pointed out, has been made to the Fakkirs visiting the Mosque in question and not to the Mosque directly. Therefore, the grant under Exhibit B-2 in this case, will not attract section 66 (*c*), as the grant is not for the support of the objects or the institutions referred to in sub-clause (*a*), (*b*) or (*c*) of the said section.

19. Thus, the suit property, which has been granted to Fakkirs visiting the Mosque in question, cannot be taken to be a wakf as defined in section 3 (1) nor can it be taken to be a 'deemed wakf' as defined in section 66 (*c*) of the Act. If that is the true legal position then the provisions of the Wakf Act including section 36-A will not apply to the suit property. Therefore, no sanction under section 36-A for leasing out the property either for agricultural or non-agricultural purposes, is necessary. As already pointed out, the Dargah, Mosque, as well as the suit property, are being administered under a scheme decree framed by the civil Court in O. S. No. 11 of 1941 on the file of Sub Court, Thanjavur. As per the terms of the said scheme, the 1st defendant has obtained the sanction of the civil Court for leasing out the Suit property and in pursuance of the said sanction the suit property has been leased out to the 2nd defendant. It is the contention of the learned counsel for the respondents that even if the suit property is taken to be a wakf property, the Wakf Board cannot ignore or overlook the scheme decree and that a scheme decree does not stand superseded by the provisions of the Act. As we have held, after due consideration, that the suit property does not constitute a wakf under section 3 (1) or a deemed wakf under section 66 (*c*), the question as to whether the Wakf Board can go behind the scheme, does not arise. Even if a finding is necessary on that aspect, we would hold that as there is no specific provision in the Wakf Act putting an end to the scheme already framed by the civil Court or nullifying the same, the scheme decree passed by the civil Courts in relation to certain wakfs should be taken to continue to be in force, unless the wakf succeeds in cancelling the scheme decree by approaching the civil Court. The general power of superintendence of the Wakf Board over all wakfs under section 15 of the Wakf

1. (1974) 1 M. L. J. 253 : 87 L. W. 375.

Act, will not enable the Wakf Board to interfere with the schemes framed by the civil Courts. The same view has been taken by Ismail J. as he then was, in *Palhi Muslim Dharmaparipalana Sangam* v. *Wakf Board*[1]. In that case, the relevant observations of the learned Judge are as follows:—

> "I am unable to agree that this power of general superintendence will extend to nullify or ignore or supersede a scheme for the administration of a wakf settled by a decree of Court. So long as a decree of the Court is in existence and so long as it has not been modified or set aside or reversed by any procedure known to the law, the Wakf Board has no jurisdiction whatever to sweep it away or to ignore it and to act contrary to the terms of the scheme in the purported exercise of its power of general superintendence under section 15 of the Wakf Act".

20. For the foregoing reasons, we are to uphold the findings of the Court below in this case.

21. The appeal therefore fails and is dismissed with costs of the 1st respondent.

R. S. —— *Appeal dismissed*

1. (1975) 1 M. L. J. 201.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT:—*K. B. N. Singh, CJ and S. Padmanabhan, J.*

The Superintendent, Tansi Leather Works, (Triplicane), Perambur, Madras-12 and another ... *Appellants**

v.

G. Gowri and others ... *Respondents*

The Management of Industrial Equipment Stores, Madras ... *Petitioner*

v.

The Presiding Officer, II Additional Labour Court, Madras and another. ... *Respondents.*

The Management of Iron and Brass Industries, Madras-14, represented by B. K. Shankar, Proprietor ... *Petitioner*

v.

The Presiding Officer, II Additional Labour Court, Madras and another. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Lay off—15 out of 23 workers laid off by the management—Reason for lay off being want of orders and inability to provide work for them—*Two workers filing applications under section 33-C (2) of the Act—Labour Court dismissing the applications—Order of Labour Court challenged under Article 226 of the Constitution—Order of Labour Court quashed—Management could not lay off workers for the reasons stated under clause 11 (1) of the Standing orders—Writ appeal by management dismissed.*

By a notice, the management of a leather works laid off 15 out of 23 workers the

*W. A. Nos. 287 and 288 of 1977 and W. P. Nos. 1218 and 1219 of 1978. *7th September*, 1982.

reason for the lay off being *want of orders and inability to provide work* for them. Two of the workers filed applications under section 33-C (2) of the Industrial Disputes Act before the Labour Court claiming full wages for the period of lay-off on the ground that the lay-off was wrong. The Labour Court held that the management was entitled to lay-off under clause 11 (1) of the Standing orders and accordingly dismissed the applications of the workers. Writ petitions filed by the workers were allowed and the orders of the Labour Court were quashed on the ground that "want of orders" and "inability" to provide work for them" would not fall within the purview of clause 11 (1) of the Standing Orders. The Labour Court was directed to compute the benefit to which both the workers were entitled. The management filed writ appeals and contended that the workers did not challenge the power of the management to lay off under the Standing orders before the Labour Court and therefore this could not be raised in the writ petition.

Held: It being the categorical case of the workers that they were entitled to full wages for the period laid off under the contract of service, it was open to them to contend, when the standing orders were sought to be relied upon by the management in support of the lay-off that the lay-off was not in pursuance of the provisions of the Standing Orders, rather they were in excess of the power or beyond the power which the management had to lay-off under the Standing Order. As no reference was made in the notice to lay-off that the lay-off was made in pursuance of the power conferred under the Standing Orders, the labourers could not obviously challenge in this application that the lay-off was not in pursuance of the Standing Orders. As the management relied on the Standing Orders, the Labour Court was entitled to go into the question whether the lay-off was in pursuance of the power under the Standing Orders or not so as to determine the quantum of compensation to be paid to the workers as it was dependent on that. [Para. 5.]

Inability to provide work was not one of the reasons mentioned in the Standing Orders of the appellant company, on which ground lay-off could be justified. Therefore, the lay-off of the workers could not be justified under the Standing Orders of the appellant-company. [Para. 8]

When the matter was before the Labour Court, in the application under section 33-C (2) of the Industrial Disputes Act, the management was bound to pay full wages as compensation. [Para 9.]

Cases referred to:—

Workmen of Dewan Tea Estate v. *Their Management*, (1964) 5 S. C. R. 548 : A. I. R. 1964 S. C. 1458 ; *Management of Kairbetta Estate, Kotagiri* v. *Rajamanikam*, (1960) 3 S. C. R. 371 : A. I. R. 1960 S. C. 893 ; *The Workmen of M/s. Firestone Tyre and Rubber Company of India (P) Ltd.* v. *The Firestone Tyre and Rubber Company*, (1976) 13 S. C. R. 369 : (1976) 3 S. C. C. 819 : A. I. R. 1976 S. C. 1775.

W. A. Nos. 287 and 288 of 1977.

Appeals under Clauses 15 of the Letters Patent against the Order of Justice Mohan, dated 4th March, 1977, and made in the exercise of the special Original Jurisdiction of the High Court in Writ Petitions Nos. 4625 and 4624 of 1975 respectively presented under Article 226 of the Constituiion of India to issue Writs of *Certiorari* calling for the records of the IInd Additional Labour Court, Madras made in Claim Petition Nos. 135 and 134 of 1973 respectively dated 28th April, 1974 and quash the said order and made therein.

W. P. Nos. 1218 and 1219 of 1978.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court, will be pleased to issue writs of *certiorari* calling for the records in I. D. Nos. 161 and 160 of 1977, respectively on the file of the first respondent and quashing the common award, dated 7th January, 1978, passed by the first respondent therein.

K. Chandrasekaran, for Appellant.

S. Ramaswami and Sanjaimohan, for Respondent.

The Judgment of the Court was delivered by

K. B. N. Singh, CJ.—Both the writ appeals and the two petitions raise a common question of law and with the consent of parties, they have been heard together and are being disposed of by a common judgment.

2. The short facts necessary for disposal of both the appeals only need be stated.

3. By a notice, dated 28th December, 1971, the Superintendent, Tansi Leather Works, informed the fifteen workmen named therein that the Management had decided to lay-off the 15 workers named therein out of 23 workers. The relevant portion of the notice reads as follows :

> "It is hereby informed to the workers that the Management had decided to give lay-off for 15 (fifteen) workers out of 23 (twenty-three) workers whose names are given below, with effect from 29th December, 1971, onwards until further notice. The reason for the lay-off being *want of orders and inability to provide work* for them". (Italies is ours).

Only two of the laid-off workers, namely S. Gowri and G. Venkataratinamma filed two applications under section 33-C (2) of the Industrial Disputes Act, hereinafter referred to as the Act, before the Lobour Court, Madras, alleging that they have been laid-off wrongly and they are entitled to full wages for the period that they had been laid off. Both the applications were taken up together. The Management contested the proceeding before the Labour Court, and the Labour Court, after hearing the parties, by a common order came to the conclusion that the Management was entitled to lay off under Clause 11 (1) of its Standing Orders (Exhibit B-1) and as there was no provision for payment of wages to the laid-off workmen, they were not entitled to claim wages and dismissed the applications of both the workers.

4. Against the said order each of the two workers filed a writ petition which were allowed by Mohan, J., who came to the conclusion that the grounds given for lay-off, namely "want of orders" and "inability to provide work for them" would not fall under the purview of Clause 11 (1) of the Standing Orders and, therefore, the lay off was unauthorised and quashed the order of the Labour Court and remanded the matter to the Labour Court only for the purpose of computing the benefit to which both the workers were entitled. It is against this order that the two writ appeals have been filed.

5. Mr. M. R. Narayanaswami, learned counsel for the appellants, submitted that in their application under section 33-C (2) of the Act the workers did not challenge the power of the Management to lay-off under the Standing Order. Therefore, it was not open to the employees to raise that question in the writ petition. Nor this question could be gone into by the Labour Court within the limited scope of section 33-C (2) of the Act. There is no substance in this contention of the learned counsel. "The workers in their application under section 33-C (2) of the Act have claimed that they are entitled to full wages under the contract of service. They also asserted that as the industrial unit was employing less than 50 workers, it could not have the advantage of paying lesser amount under Chapter V-A of the Act. By virtue of section 25-A of the Act, sections 25-C to 25-B will not be attracted and the Management will not be entitled to pay the concessional rate of payment, that is 50 per cent of the wages. It being the categorical case of the workers that they are entitled to full wages for the period laid-off under the contract of service, it is open to them to contend, when the Standing Order is sougnt to be relied upon by the Management in support of the lay-off, that the lay-off was not in pursuance of the provisions of the Standing Order, rather they were in excess of the power or beyond the power which the management had to lay off under the Standing Order. As no reference was made in the notice to lay-off that the lay-off was made in pursuance of the power conferred under the Standing Order, the labourers could not obviously challenge in their application that the lay off was not in pursuance of the Standing Order. As the Management relied on the Standing Order, the Labour Court was entitled to go into the question whether the lay off was in pursuance of the power of the Standing Order or not so as to determine the quantum

of compensation to be paid to the workers as it was dependent on that.

6. It may be mentioned that Mr. Narayanaswami has not advanced any argument before us that the lay-off can be justified under the provisions of section 2 (*kkk*) of the Act as the Management employed less than 50 workers, and could have the advantage of paying wages at a lesser rate than the full wages, as provided under section 25-C to 25-B of the Act as those provisions are not applicable to such an establishment in view of section 25-A of the Act. The provision of section 2 (*kkk*) of the Industrial Disputes Act for lay-off can usefully be quoted, which reads as follows :

> "2 (*kkk*) : 'lay-off' (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw material or the accumulation of stocks or the break-down of machinery are . *for any other reason* to give employment to a workman whose name is borne on the master rolls of his industrial establishment and who has not been retrenched". (Emphasis added).

The provision of this sub-clause came to be interpreted by the Supreme Court in the case of *Workmen of Dewan Tea Estate and others* v. *Their Management*[1], and it may be stated that the expression "for any other reason" specified in the said clause, which we have underlined, must be construed *ejusdem generis* with the words that procede them. *Vide Management of Kairbetta Estate, Kotagiri* v. *Rajamanickam*[2].

7. Mr. Narayanaswami has further submitted that the Standing Order 11 of the appellant-company is of wider import than mentioned in section 2 (*kkk*) of the Act inasmuch as it uses the expression "other cause beyond his control' and this will include the expressions "want of orders" and "inability to provide work" used in the notice of lay-off. The relevant clause of the appellant-company's Standing Order, which is marked as Exhibit R-1, may usefully be quoted :

> "11. *Temporary closure of Departments and lay-off of workers for causes beyond the control of the Employer* :
>
> (1) The employer may, at any time, in the event of fire, catestophe, breakdown of machinery, or stoppage of power supply, epidemic, civil commotion or other cause beyond his control, stop working any machine or close any department or departments wholly or partially for any period or periods "

8. Interpreting the provision "other causes beyond his control" in the case of *Workmen of Dewan Tea Estate and others*[1], the Supreme Court also held that the other causes beyond his control for one thing should be similar to the causes that have preceded, and observed as follows :

> "The other argument urged before us is that the last clause of rule 8 (*a*) (*i*) which refers to 'other causes beyond his control' would take in the financial difficulties of the Companies. We are not inclined to accept this argument also. Other causes beyond his control for one thing should be similar to the causes that have preceded; even otherwise, we see no justification for the argument that the financial difficulty which is alleged to have confronted the respondent was beyond its control".

Faced with that difficulty, Mr. Narayanaswami has advanced an argument that in the Standing Order of that case stoppage of supply was held to be a good ground for lay-off and relied on the following observation of the Supreme Court in that case:

> "Stoppage of supply must in the context, mean stoppage of raw material or other such thing. In regard to the factory, the stoppage of supply may mean the stoppage of tea leaves, or in the case of field work, it may mean the stoppage of supply of other articles necessary for field operations. It is impossible to accept the argument that 'supply' in the context can mean money or funds."

1. (1964) 5 S. C. R. 548: A. I. R. 1964 S. C. 1458.
2. (1960) 3 S C. R. 371 : A. I. R. 1960 S. C. 893.

1. (1964) 5 S. C. R. 548 ; A. I. R. 1964 S. C. 1458.

Applying the same principle, in the Standing Order in the instant case also "want of orders" would be deemed to be a stoppage of supply without which the industry could not run. This argument of the learned counsel is based on a mis-reading of the Standing Order. The Standing Order of the appellant-company refers to a "stoppage ot power supply" and not "stoppage of power or supply". "Inability to provide work" is not one of the reasons mentioned in the Standing Order of the appellant-company, on which ground lay off could be justified. Therefore, the lay-off of the workers could not be justified under the Standing Order of the appellant-company. The Standing Order lays down that in such cases payment would be made in accordance with law. No law has been pointed out to us on behalf of the appellants as to the rate at which compensation could be paid to the workers. It will be relevant in this connection to refer to clause 16 (*o*) of the Standing Orders of the appellant-company, which reads as follows:

> "16. The following acts or omissions shall be treated as miscouduct and be liable for disciplinary action :
>
> * * * * * * * * * * * *
>
> (o) Undertaking employment under any other employer in any capacity without the permission of the Management".

Under this provision the workers could not have sought employment elsewhere without the permission of the Management.

9. When the matter is before the Labour Court in application under section-33-C (2) of the Industrial Disputes Act, the Management is bound to pay full wages as compensation. It has been held by the Supreme Court in the case of *The Workmen of M/s. Firestone Tyre and Rubber Company of India (P.) Limited* v. *The Firestone Tyre and Rubber Company*[1], that the position would be otherwise if it would have been a reference under section 10 (1) of the Act where the Tribunal has larger power than the Labour Court. The following observations of the Supreme Court may usefully be quoted :

1. (1976) 3 S.C R. 369 : (1976) 3 S. C. C. 819 : A. I. R. 1976 S. C. 1775.

> "In a reference under section 10 (1) of the Act it is open to the Tribunal or the Court to award compensation which may not be equal to the full amount of basic wages and dearness allowance. But no such power exists in the Labour Court under section 33-C (2) of the Act. Only money due has got to be quantified. If the lay-off could be held to be in accordance with the terms of the contract of service, no compensation at all could be allowed under section 33-C (2) of the Act, while in the reference some compensation could be allowed. Similarly on the view expressed above that the respondent company had no power to lay-off any workmen, there is no escape from the position that the entire sum payable to the laid-off workmen except the workmen who have settled or compromised, has got to be computed and quantified under section 33-C (2) of the Act for the period of lay-off."

10. Coming to the two writ petitions, which were posted to be heard along with these appeals, they deal with the lay-off of the workers who have been referred to the Industrial Tribunal under section 10 (1) of the Act. The Industrial Tribunal has held in both the cases that although the lay-off was in 1976; it was continued till the date of the award which was made on 7th January, 1978, awarding half the wages as compensation although there was no provision to that effect in the Standing Orders of the petitioner companies where it was merely stated that payment was to be made in accordance with law. No provision of law has been pointed out to as to what would be the quantum of compensation to be paid to the workers. In view of the decision of the Supreme Court in the case of *The Workmen of M/s. Firestone Tyre and Rubber Company of India (P) Limited* v. *The Firestone Tyre and Rubber Company*[1], the impugned award is quite valid and does not call for any interference.

11. In the result, the appeals and the writ petitions are dismissed, but in the circumstances of the case, there will be no order as to costs.

S. J. —— *Writ appeals and writ petitions dismissed.*

1. (1976) 3 S. C. R. 369 : A. I. R. 1976 S. C. 1775.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Alagammai and others .. *Appellants**

v.

V. Rakkammal .. *Respondent.*

(A) *Indian Succession Act (XXXIX of 1925), sections* 213, 228, 270, 57 (a) *and* (b)—*Scope—Executor—Will executed and probated outside India — Deceased leaving estate in India—Ancillary probate to be obtained in India to assert right to the estate in India.*

(B) *Hindu Law—Marriage—Presumption in favour of, from long cohabitation—When rebutted.*

It is true that law does not favour concubinage, but that the presumption is in favour of a marriage when a man and a woman are known to have cohabited continuously for a long number of years, though such a presumption is a rebuttable one. Where a person is already married to a woman and had a child by her, and persons who would have normally attended his alleged marriage with another woman, if such a marriage had taken place were neither invited nor intimated and there was no evidence of the woman having been treated by the community as the wife of the man, nor was there any acknowledgment in his will of the woman by the man as his wife, no presumption of a second marriage arises by reason of long cohabitation. These circumstances would totally destroy any presumption of marriage between the man and the woman.

[*Para.* 14.]

In cases which would fall under section 57 (*a*) and (*b*) of the Indian Succession Act, the obtaining of a probate would be necessary, if the Court is called upon to recognise rights to properties claimed or asserted either as an executor or as a legatee under the will executed in India. With respect to wills executed outside India in respect of which a foreign probate has also been obtained the requirement of section 213 (1) would be satisfied by obtaining under section 228 an ancillary pribate or what in English law is termed as "resealing of the probate". Otherwise the procedural requirement of the *lex fori* enacted under section 213 (1) may not be satisfied and it is only with a view to enable parties claiming under a will executed outside India to make claims to properties situate in India, the procedure under section 228 has been prescribed. Section 228 is in the nature of an enabling provision and when read with section 270 permits the obtaining of an ancillary probate. Section 270 is enacted on the principle that the presence of the personal property of the deceased would be sufficient foundation for purposes of granting probate.

[*Para.* 19.]

If section 213 of the Indian Succession Act required the production of a probate as a procedural requirement before recognition of the rights to property by Court under a will, either of an executor or a legatee and if section 228 read with section 270 of the Act further provided for the obtaining of an ancillary probate in respect of a will executed and probated outside India for the purpose of enabling the executors and legatees to assert rights to the estate of the deceased in India, then the requirement as to the obtaining of a probate in this case in the shape of an ancillary probate could not be stated to be unnecessary in view of section 57 (*a*) and (*b*) of the Act. The appellants' failure to obtain an ancillary probate under section 228 of the Act would be fatal to their claim under the will Exhibit B-2, a probate in respect of which had been issued by a foreign Court under Exhibit B-4.

[*Para.* 19.]

Cases referred to:—

Nagayasami Naidu v. *Kochadai Naidu,* (1968) 81 L.W. 436: (1970) 1 M.L.J. 105: I.L.R. (1969) 1 Mad. 459: A.I.R. 1969 Mad. 329; *Hasara Singh* v. *Attar Kasur,* A.I.R. 1976 Punj. & Har. 24; *Rajagopal Pillai* v. *Pakkiam Ammal,* (1968) 2 M.L.J. 411; *Sivachakravarthi* v. *Sivasankaran,* (1971) 84 L.W. 280; *Raghuvir Kumar* v. *Shanmughavadivu,* (1970) 2 M.L.J. 193: A.I.R. 1971 Mad. 330; *Badri Prasad* v. *Deputy Director Consolidation,* (1978) 3 S.C.C. 527: A.I.R. 1978 S.C. 1557; *Nagarajama* v. *State Bank*

*Appeal No. 581 of 1977 and Memo. of Cross-Objections.

18th June, 1982.

of India, (1961) 1 An.W.R. 65: A.I.R. 1961 A. P. 320; *Kumarayya Chettiar* v. *Cheyyalachi,* (1972) T.L.N.J. 464; *Manasing and Company* v. *Amad Kuchi and Company,* (1894) I. L. R. 17 Mad. 14; *Sohan Singh* v. *Bhag Singh,* A.I.R. 1934 Lah. 599; *Pevibai* v. *Motumal Kalachand,* A.I.R. 1937 Sind. 84; *Balackwood and Sons* v. *Parasuraman,* I.L.R. (1959) Mad. 484: A.I.R. 1959 Mad. 410; *Bhaiya Ji* v. *Jageshwar Dayal,* A.I.R. 1978 All. 268; *Hem Nalini* v. *Isolyne Sarojbashini,* A. I. R. 1962 S. C. 1471; *Ram Lal* v. *Chanan Dass,* A.I.R. 1928 Lah. 349; *Rampada Ghosh* v. *Satish Chandra,* A.I.R. 1943 Cal. 235; *Bhaurao Dadajirao* v. *Lakshmibai,* (1896) I. L. R. 20 Bom. 607.

Appeal and memorandum of Cross-Objection against the decree of the Court of the Subordinate Judge, Sivaganga, dated 14th April, 1977, and passed in O.S. No. 32 of 1976.

M. Srinivasan, for Appellants.

G. Subramaniam, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 to 5 in O.S. No. 32 of 1976, Sub-Court, Sivaganga, are the appellants in this appeal. The respondent herein instituted that suit as an indigent person for a declaration that as heir to her father Velu Ambalam, she is entitled to the suit properties and for recovery of possession of those properties from the appellants. The respondent claimed that she is the daughter of late Velu Ambalam and one Karupayee (P.W. 5) who were married and to whom the respondent was born on 3rd November, 1943, at Amaravathi Pudur where all of them were living together till 1950. According to the case of the respondent, the first appellant, whose children are appellants 2 to 5, was the daughter of the sister of Velu Ambalam and she was brought into the family to be of assistance, but later Velu Ambalam developed intimacy with her as a result of which appellants 2 to 5 were born. There was no marriage between Velu Ambalam and the first appellant, according to the respondent. The further case of the respondent was that due to the instigation of the first appellant, she and her mother Karupayee (P.W. 5), the legally wedded wife of Velu Ambalam, were driven out of the house some time in 1950 and a few years thereafter Karupayee (P.W. 5) married one Subbiah Ambalam of Ariyakudi, who also later died. The respondent stated that she lived with her maternal grandmother for some time and on her death, the respondent had been living with her maternal aunt. On the death of Velu Ambalam on 27th March, 1973, according to the respondent, she was his only legal heir and, therefore, she became entitled to all the properties which belonged to her father Velu Ambalam. The respondent also claimed that though 'B' schedule properties stood in the name of the first appellant, they were really acquisitions benami in her name by Velu Ambalam. Claiming that she is the sole heir to her deceased father Velu Ambalam, the respondent laid the suit for a declaration that 'A' to 'P' schedule properties in the plaint belong to her as heir to Velu Ambalam and also for recovery of possession of the same from the appellants and for mesne profits.

2. On behalf of appellants 3 to 5, who were defendants 3 to 5 in the suit, the first appellant filed a written statement and this was adopted by the second appellant, who was the second defendant in the suit. The first appellant stated that Karupayee (P.W. 5) was not the legally wedded wife of the deceased Velu Ambalam and that the respondent was not his daughter. The driving out of Karupayee (P.W. 5) and the respondent from the house by the first appellant was denied. The first appellant claimed that she is the legally wedded wife of Velu Ambalam and that the other appellants, namely, appellants 2 to 5 are the legitimate children born to her through Velu Ambalam out of such lawful wedlock The details of the properties given in the plaint were stated to be not correct. As regards 'B' schedule properties, the first appellant claimed those properties to be her absolute properties, but that the rest of the properties belonged to Velu Ambalam. The appellants also set up a will dated 19th December, 1965, stated to have been executed by Velu Ambalam under which he bequeathed all his properties to the children of the first appellant appointing her and others as executors and, therefore, they claimed that the respondent will not be entitled to any of the properties of Velu Ambalam either as his heir or even otherwise.

3. On the aforesaid pleadings of the parties, the learned Subordinate Judge framed the following issues and additional issue for trial:

"1. Whether the plaintiff's (respondent's) mother Karuppayee was the legally wedded wife of Velu Ambalam and plaintiff (respondent) was born to them?

2. Whether first defendant (first appellant) was married to Velu Ambalam and even if the marriage is true, is such marriage valid?

3. Whether plaintiff (respondent) is the sole heir to Velu Ambalam?

4. What are the properties left by Velu Ambalam?

5. To what relief if any is the plaintiff (respondent) entitled?

Additional issue framed on 16th December, 1976:

6. Whether the will dated 19th December, 1965, executed by Velu Ambalam propounded by defendants (appellants) is true and valid?"

4. Before the lower Court, on behalf of the respondent, Exhibits A-1 to A-6 were marked and P.Ws. 1 to 5 were examined, while, on behalf of the appellant, Exhibits B-1 to B-8 were filed and D.Ws. 1 to 3 were examined. On a consideration of the oral as well as the documentary evidence, the Court below found that a valid marriage between Velu Ambalam and Karupayee (P.W. 5) had been established and that the respondent was born to them out of such lawful wedlock. In considering the question of the marriage of the first appellant to Velu Ambalam, the Court below found that there was no acceptable evidence of any marriage between the first appellant and Velu Ambalam and that such a marriage could not also be presumed from the cohabitation of the first appellant with Velu Ambalam and the begetting of children, as the evidence established clearly a valid marriage between Velu Ambalam and Karupayee (P.W. 5). Dealing with the truth and validity of the will dated 19th December, 1965, stated to have been executed by Velu Ambalam, the Court below found that the will in question was a foreign will and that the obtaining of a probate in a foreign country would not be sufficient and that, therefore, in the absence of obtaining letters of administration from a competent Court in India, the will will not have any effect as against the respondent, who had been proved to be the daughter and sole heir of Velu Ambalam. Regarding the properties of Velu Ambalam, it was found by the Court below that there was no evidence of benami acquisitions by Velu Ambalam in the name of the first appellant in relation to 'B' Schedule properties apart from a bare averment to that effect in the plaint and that, therefore, those properties will not be available to the respondent, as properties belonging to Velu Ambalam. Likewise, as regards the properties comprised in Schedules 'C' to 'E', no evidence was let in to show the availability of those properties and consequently, only the rest of the properties comprised in A-1 and A-2 schedules were held to belong to Velu Ambalam and also available. In view of the status of the respondent as the sole heir and daughter of the deceased Velu Ambalam, she was declared entitled to and recover possession of A-1 and A-2 schedule properties only and accordingly, the suit was deceed in part. The relief of mesne profits prayed for by the respondent was negatived. It is the correctness of this decree that is challenged by the appellants in this appeal, while, the respondent has preferred the memorandum of cross-objections in so far as the decree of the Court below did not grant the relief of mesne profits.

5. Mr. M. Srinivasan, the learned counsel appearing on behalf of the appellants contended that there is no acceptable evidence regarding the marriage between Velu Ambalam and Karupayee (P.W. 5) and that, therefore, the conclusion of the Court below contra is erroneous. In this connection, the learned counsel pointed out that the evidence of P.Ws. 1 and 4 accepted by the Court below is not reliable, as they were persons brought by one Srinivasan, the maternal uncle of the respondent, who was conducting the case on her behalf. It was also stated that it was strange that no attempt was made to bring about a mediation between Velu Ambalam and Karupayee (P.W. 5) when disputes arose between them owing to the first appellant having come into the household and this would also establish, according to the learned counsel for the appellants, that there was no marriage between Velu Ambalam and

Karupayee (P.W. 5) and that they were also not living as man and wife. Attention was also drawn to the circumstance that the entry in Exhibit A-1 was not made by P.W. I and that that entry has not been established to relate to Velu Ambalam. It was also the endeavour of the learned counsel for the appellants to show that Exhibit A-2, the birth register extract of the respondent herein, no doubt referred to the birth of a daughter to Velu Ambalam and Karupayee, but that the first appellant was also known as Karupayee and Exhibit A-2 referred to a female child born to Velu Ambalam and the first appellant, who later died as shown by Exhibit B-1 and, therefore, the respondent cannot claim the properties of Velu Ambalam as his heir. In this connection, the learned counsel for the appellants relied upon the decisions in *Nagayasami Naidu* v. *Kochadai Naidu*[1] and *Hasara Singh* v. *Attar Kaur*[2], and pointed out that the entries in Exhibit A-2 would not by themselves be conclusive, unless supplemented by other evidence and that in this case, there was no such evidence and, therefore, the entry in Exhibit A-2 cannot be relied upon to establish that the respondent was the daughter of Velu Ambalam and Karupayee (P.W. 5).

6. On the other hand, the learned counsel for the respondent drew attention to the specific case of the respondent as set out in paragraph 3 of the plaint to the effect that Velu Ambalam married Karupayee (P.W. 5) and that after the marriage, both of them were living together and the respondent was born to them on 3rd November, 1943, in Amaravathi Pudur and that they were all living together in that place till 1950 as members of one family. According to the learned counsel for the respondent, P.Ws. 1, 2 and 4 had attended the marriage between Velu Ambalam and Karupayee (P.W. 5) and their evidence is entitled to acceptance, especially when that evidence had been accepted by the Court below and no reasons have been stated as to why their evidence ought not to be accepted. It is also further pointed out by the learned counsel for the respondent that there is absolutely nothing to discredit the evidence of P.Ws. 2 and 4 as regards the marriage of Velu Ambalam with Karupayee (P.W. 5.). The entries in Exhibit A-1 according to the learned counsel for the respondent, corroborate the evidence of P.Ws. 1, 2 and 4 to the effect that Velu Ambalam was married to Karupayee (P.W. 5) and that a daughter was born to them. It is also further pointed out that Exhibit A-2 admittedly related to the daughter born to Velu Ambalam which had been registered by P.W. 1 after enquiry and that, therefore, it is established beyond doubt that the respondent is the daughter of Velu Ambalam, born to him and Karupayee (P.W. 5). The learned counsel would also submit that even if, according to the appellants, Exhibit A-2 refers to a daughter of Velu Ambalam, then it was for the appellants to show that the first appellant is Karupayee referred to therein and also that Exhibit B-1 relates to the demise of the child born to Velu Ambalam and the first appellant which has not been done, as Exhibit B-1 was marked only in the course of the cross-examination of P.W. 1 and there is nothing therein to show the names of the parents of the deceased child. It is also further contended that the child whose death is registered under Exhibit B-2 is shown to be of 2 years at the time of its death on 10th September, 1950, and, therefore, obviously it could not have any reference whatever to the child whose birth has been registered under Exhibit A-2. The absence of any suggestion to P.W. 1 that Exhibit B-1 relates to the child referred to in Exhibit A-2 is also strongly relied upon.

7. The first and the foremost question that has to be decided is, whether there was a marriage between Velu Ambalam and Karupayee (P.W. 5). In this connection, the evidence that has been placed before the Court by the respondent is that of P.Ws. 1, 2, 4 and 5 and the enumeration register Exhibit A-1 and the certified extract from the register of births under Exhibit A-2 relating to the birth of the respondent. As against this, D.Ws. 1 and 3 would claim that there was no marraiage between Velu Ambalam and Karuriage (P.W. 5), but that there was only one marriage between Velu Ambalam and the first appellant. Alagammai *alias* Karupayee. Necessarily, therefore, the oral evidence has to be scrutinised in the light of the documen-

1. (1968) 81 L.W. 436: (1970) 1 M.L.J. 105: I.L.R. (1969) 1 Mad. 459: A.I.R. 1969 Mad. 329.

2. A.I.R. 1976 Punj. & Har. 24.

tary evidence to ascertain which version is true and more probable.

8. P.W. 1, at the relevant time, was the Headman of Ariyakudi Group which included Amaravathi Pudur village, where Velu Ambalam was residing. He would state that Exhibit A-1 which is the ration account signed by the concerned officer would show the names of the members of the family of Velu Ambalam, which includes that of P.W. 5 as well as the respondent herein, P.W. 3. He has clearly stated that he attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and also that the respondent was born in 1943. Regarding the entry of the birth of the respondent under Exhibit A-2, P.W. 1 has stated that he made the entries on information received from the Thalayari after verification and the girl whose birth had been registered by him is the daughter of Velu Ambalam and Karupayee (P.W. 5). In the course of his cross-examination, he has reiterated that the respondent was born to Velu Ambalam and Karupayee (P.W. 5). He would also say that there were two Velu Ambalams, one of whom was M. Velu Ambalam, who died and that he does not know whether he had a child by name Rakkammal. Exhibit B-1, according to P.W. 1, relates to the death of a female child of the name of V. Rakkammal. In the course of his further cross-examination, P.W. 1 has stated that Velu Ambalam was adopted in 1935-36 and got married at Sarasipatti in 1936-37 and that the birth of the only child born to Karupayee (P.W. 5) was registered by him after enquiry. He would also admit that Karupayee (P.W. 5) is his pangali's daughter and that after marriage there were misunderstandings between Velu Ambalam and Karupayee (P.W. 5) and later Karupayee (P.W. 5) married one Subbiah Ambalam of Ariyakudi. A suggestion that the respondent is not the daughter of Velu Ambalam, that Karupayee (P.W. 5) is not the wife of Velu Ambalam, but that the first appellant alone in his wife, has been denied by him. P.W. 2 is a resident of Amaravathi Pudur and belongs to a different caste. He has given evidence about his having known Velu Ambalam and his wife Karupayee (P.W. 5) and also the respondent as their daughter. Velu Ambalam, according to P.W. 2, owned lands adjacent to his. He would also speak to his having attended Velu Ambalam's marriage with Karupayee (P.W. 5) and the birth of the respondent to them. He has stated that he does not know whether the first appellant had married Velu Ambalam. In the course of his cross-examination, he had reiterated the marriage between Velu Ambalam and Karupayee (P.W. 5) 40 years back. He also admitted owning substantial properties. P.W. 4 is another pangali of Velu Ambalam and he has stated that he attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and also that the respondent was born to them. He would deny any marriage between the first appellant and Velu Ambalam. He would further state the Velu Ambalam and Karupayee lived for about 3 years and the respondent was born to them and thereafter the first appellant was brought which gave rise to misunderstanding resulting in P.W. 5 and the respondent being driven out. His further evidence is to the effect that Velu Ambalam was a close relation of his and that he had also gone to Malaya and was living at a distance of 40 miles from the place where Velu Ambalam was staying. In the course of his cross-examination, he would reiterate Velu Ambalam's marriage with Karupayee (P.W. 5) and their living as husband and wife for 2 or 3 years and the birth of the respondent and their coming over to Amaravathi Pudur. He is positive that the name of the first appellant is not Karupayee. P.W. 5 is Karupayee herself and she has spoken to the marriage between Velu Ambalam and herself and also the birth of the respondent to them. She would state that the first appellant who was none other than the sister's daughter of Velu Ambalam was brought to do the household work, but that Velu Ambalam later developed intimacy with her as a result of which misunderstanding arose which resulted in her being driven out of the house. She would state that the respondent was entrusted to her mother to be looked after and that she married again. In the course of cross-examination, P.W. 5 had denied that Rakkammal referred to in Exhibit B-1 is her daughter, who died in 1950. She has also stated that Velu Ambalam was giving out that he had married the first appellant. A suggestion that the first appellant gave birth to Rakkammal, who died in 1950, was denied by her.

9. As against this evidence, the first appellant examined as D.W. 1 has stated that her name is Alagammai *alias* Karupayee and that her maternal uncle Velu Ambalam married her when she was 15 or 16 years old and Velu Ambalam was 11 years older than herself. The marriage, according to her, was 6 years after the adoption and the birth of the daughter was in the next year, and on her death, the second appellant was born. She is positive that no steps were taken to record these births and deaths. She would deny that Karupayee (P.W. 5) is the wife of Velu Ambalam and the respondent is their daughter. In the course of cross-examination, D.W. 1 admitted that there was no record to show that she was also known as Karupayee. She has stated that Velu Ambalam did not marry P.W. 5 and that they did not live as man and wife. She would speak to the adoption of Velu Ambalam by his sister, though she would say that the year of adoption is not known. She would add that the year of her marriage is not known to her and that no invitations were issued for the marriage. She would reiterate that a child was born the year after the marriage, but that the year of the birth of the child is not known. She would claim that the first child was alive for 7 or 8 years and after its death, five children were born to her. She reiterated that there was no record of any of the births or death. She denied that the respondent was the daughter of Velu Ambalam and that she was a heir to her father. D.W. 3 is the elder brother of Velu Ambalam. He would speak to the adoption of Velu Ambalam and his marriage 30 or 35 years back. According to him, two years after his marriage, the marriage of Velu Ambalam took place. He would depose that the first appellant Alagammai was also known as Karupayee and that he was present at the time of the marriage between Velu Ambalam and the first appellant, which was celebrated according to caste rites. According to him, his relations had also come to attend the marriage. He is positive that Karupayee (P. W. 5) was not married to Velu Ambalam and that the respondent is not the daughter of Velu Ambalam. In the course of cross-examination, D.W. 3 has admitted that there are no records to show that the first appellant Alagammai was also known as Karupayee. He would further admit that the year of marriage of Velu Ambalam with Alagammai is not known, though a child was born the year after the marriage. According to him, no invitation cards were issued for the marriage and others who had attended the marriage are all alive. No letters were sent to relations according to D.W. 3, regarding the marriage of Velu Ambalam with Alagammai. D.W. 3 would also add that Velu Amabalam did not marry Karupayee (P.W. 5) and that he does not know whose doughter the respondent is.

10. P.W. 1 is a disinterested person well-acquainted with Velu Ambalam and he has produced Exhibit A-1, which is the ration account and had also entered the birth of the respondent under Exhibit A-2 on 3rd November, 1943. He has clearly spoken to the marriage between Velu Ambalam and P.W. 5 in 1936-37. P.W. 5 is his pangali's daughter. There is nothing which improbablises the evidence of P.W. 1, either with reference to his having attended the marriage between Velu Ambalam and Karupayee (P.W. 5) or his having entered the birth of the respondent under Exhibit A-2 on 3rd November, 1943, after verifying the information received from the Thalayari Pachimuthu, who had since died. No motive has been attributed to P. W. 1. Nothing has been stated as to why the evidence of P.W. 1 should not have been accepted. His evidence is clear and cogent and clearly establishes the marriage between Velu Ambalam and P.W. 5 at Sarasipatti. The evidence of P.W. 2, who owned lands adjacent to that of Velu Ambalam is convincing and he is also a person who had attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and who is acquainted with the birth of the respondent to them. He is a person of substance and even as against P.W. 2, nothing has been suggested which would render his evidence regarding his having attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and the birth of the respondent to them unacceptable. P.W. 4 is a pangali of Velu Ambalam and Velu Ambalam was related to him as his paternal uncle Rakkappan's son and his evidence is also to the effect that he attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and that the respondent is the daughter born of such marriage. It has no doubt been elicited in the cross-examination of P.W. 4, that he had been convicted for the consumption of

arrack. But that does not detract from the truth of his version as a close pangali of Velu Ambalam, who had attended the marriage. Thus, the evidence of P.Ws. 1, 2 and 4 clearly established the marriage between Velu Ambalam and P.W. 5 and also the birth of the respondent to them.

11. The plea of the appellants that there is no evidence regarding the marriage between Velu Ambalam and P.W. 5 is thus without substance. P.Ws. 1 and 4 are pangalis, who had attended the marriage and P.W. 2 is an utter stranger who also attended the marriage and in the absence of anything against the acceptance of their testimony, their evidence has got to be accepted. It is also seen that this evidence is corroborated by the documentary evidence in this case. Exhibit A-1 is the enumeration register relating to the villages in the Ariyakudi Group and this has been prepared in the year 1944. Entry No. 311, therein relates to Velu Ambalam. It has also been verified and initialled by the concerned officer on 14th December, 1944. Therein, the members of the family of Velu Ambalam have been shown as Karupayee, Kanthan and Rakkammal. P.W. 1's evidence is to the effect that Karupayee, referred to therein, is Velu Ambalam's wife and Rakkammal is none other than the respondent and that Kanthan was the servant of Velu Ambalam. Though P. W. 1 would say that Karupayee was not described as the wife of Velu Ambalam as such, yet, by reason of her name having been entered in the appropriate column, her relationship as the wife of Velu Ambalam is made out. It may be that Exhibit A-1 had not been produced from proper custody. But even so, it must be remembered that it has been produced by the concerned village Headman, who was in charge of the village in the year 1944, when there was no reason whatever for anybody, more so for a public officer to have made any false entries therein. Exhibit A-2 shows that the birth of a female child on 3rd November, 1943, has been registered. Under column 8, father's name has been shown as Velu Ambalam, son of Rakkappan Ambalam, while the mother's name under column 9 has been entered as Karupayee. The informant's name is Pachimuthan. With reference to the entries in Exhibit A-2, it has already been seen, that even the counsel for the appellants had not disputed the name of the father as Velu Ambalam, though the first appellant would claim that it related to a child born to her through Velu Ambalam, but later died. If the reference in Exhibit A-2 to Velu Ambalam is correct, then it is for the first appellant to establish that Karupayee, referred to therein, is herself. It is not the stand of the first appellant in her written statement that she was also known as Karupayee. It has already been seen how in the evidence of the first appeallant examined as D.W. 1, she had clearly admitted that no steps were taken either to record the births or the deaths and also that there was no record to show that her name is Karupayee. If, therefore, even according to D.W. 1, the birth or the death of the children were not recorded and there was no record to show that her name is Karupayee, then the irresistible conclusion is that Exhibit A-2 refers to the only Karupayee, who is P. W. 5 and the entry therein relates only to the respondent. It is necessary in this connection to advert to the stand taken by the appellants in relation to the entries under Exhibit A-2 in the light of Exhibit B-1. The entry relating to the birth of a daughter to Velu Ambalam and Karupayee (P.W. 5) under Exhibit A-2 was made by P.W. 1 after verification of the details. Exhibit B-1, according to the appellants, related to the death of the child whose birth was recorded under Exhibit A-2 and that, according to them, was the first daughter born to Velu Ambalam and the first appellant. It has earlier been seen from the admission of D.W. 1, that births and deaths had not been recorded and, therefore, in the light of her own evidence, Exhibit B-1 cannot refer to the child born to Velu Ambalam and the first appellant, whose birth had been registered under Exhibit A-2 and who subsequently died which had been registered under Exhibit B-1. Apart from this, it is curious that the names of the parents of Rakkammal whose death has been registered under Exhibit B-1 has not been given at all and, therefore, there is no knowing whether Rakkammal whose name is found in Exhibit B-1 was actually the daughter of the first appellant and Velu Ambalam as claimed by the appellants. In addition, it is seen that the child whose death has been registered under Exhibit B-1 is stated to have been 2 years old at the time of its death. Therefore, that child must have been born in 1948 or so. It is seen from the evi-

dence of D.W. 1, that 6 years after the adoption of Velu Ambalam, the marriage had taken place. The evidence of P.W. 1 is to the effect that the adoption of Velu Ambalam was in 1936 and if the version of D.W. 1 is to be accepted, then Velu Ambalam should have married the first appellant some time in 1942 and her specific evidence is that the child was born the next year of her marriage, that is, in 1943 and died later. If that be so, the child should have been 7 years old at the time of its death and not 2 years as stated in Exhibit B-1. There is thus as inconsistency in the oral testimony of D.W. 1 and Exhibit B-2. From the foregoing, it is evident that the child whose birth has been registered in Exhibit A-2 is not the same child whose death has been registered in Exhibit B-1. This would establish that the appellants are merely attempting to take advantage of the name, Rakkammal found in Exhibit B-1 and spin out a possible defence on that basis which has not been established at all. The Court below was quite justified, therefore, in concluding on the basis of the evidence of P.Ws. 1, 2 and 4 and also the entries in Exhibits A-1 and A-2 that Velu Ambalam had married Karupayee (P.W. 5) and that the respondent herein was the daughter born out of such lawful wedlock.

12. It now remains to consider the question of the marriage of the first appellant with Velu Ambalam. It must be noticed that P. W. 1 has stated that Velu Ambalam was married to Karupayee (P.W. 5) some time in 1936-37 and that the first appellant was only a concubine of Velu Ambalam. P.W. 2 would state that he does not know whether the first appellant was only a concubine of Velu Ambalam. P.W. 2 would state that he does not know whether the first appellant was married to Velu Ambalam. P.W. 3, a close pangali of Velu Ambalam, has clearly stated that the first appellant was not married to Velu Ambalam. P.W. 5 has given evidence as regards the circumstances under which the first appellant came to the household of Velu Ambalam and how subsequently Velu Ambalam developed illicit intimacy with her. Even in the course of her cross-examination. P. W. 5 has stated that Velu Ambalam was giving out that he had married the first appellant. The evidence of the first appellant examined as D.W. 1 as regards the marriage between her and Velu Ambalam is not very convincing. Though in the course of chief examination D.W. 1 has stated that 6 years after the adoption of Velu Ambalam, she was married to him, she was not in a position to give either the year of adoption of Velu Ambalam or the year of her own marriage with Velu Ambalam. It is the further evidence of D.W. 1, that no invitations were given for her marriage with Velu Ambalam. D.W. 3, who is none other than the brother of Velu Ambalam, was frank to confess that the year of marriage of the first appellant with Velu Ambalam is not known and that no invitation cards for the marriage between the first appellant and Velu Ambalam had been issued. Though according to D.W. 3 other persons who had attended the marriage are alive, none of them had been examined. He also admitted that there was no letter to the relations regarding Velu Ambalam's marriage with the first appellant. In short, the evidence in relation to the marriage between the first appellant and Velu Ambalam is only the oral evidence of D.Ws. 1 and 3. It is strange that D.Ws. 1 and 3 are unable to even recall the year of marriage of Velu Ambalam with the first appellant. It is more strange that though other persons who had attended the marriage of Velu Ambalam with the first appellant are stated to be alive, no independent witness had been examined on behalf of the appellants to establish the marriage between the first appellant and Velu Ambalam. No invitations for the marriage between the first appellant and Velu Ambalam had been sent to anybody. D.W. 3 would even go to the extent of saying that no letters even were sent to the relations regarding the marriage of the first appellant with Velu Ambalam. It is surprising that the marriage between the first appellant and Velu Ambalam should have been conducted in such a secret manner, the reasons for which are not known. In the normal course, one would expect invitations to be sent not only to close relations but also to other outsiders and intimation with reference to the marriage to others as well. The evidence of persons who had attended the marriage would be a strong circumstance to establish the celebration of marriage between the first appellant and Velu Ambalam. In its absence, it is rather difficult to accept the case of the first appellant that she was married to Velu Ambalam, 6 years after his adoption,

when even the year of adoption and marriage do not clearly appear from her evidence. The conclusion is, therefore, irresistible that there was no marriage between the first appellant and Velu Ambalam.

13. The question of drawing a presumption in favour of marriage between the first appellant and the deceased Velu Ambalam may now be considered. As regards this, the learned counsel for the appellants contended that the recitals in the will Exhibit B-2 executed by Velu Ambalam on 19th December, 1965, describe the first appellant as his wife and she has also been referred to as Alagammai Ammal *alias* Karuppayee Ammal and that this would establish that the first appellant was known by both the names and was also the wife of Velu Ambalam. The circumstances that the first appellant and Velu Ambalam had been living together as man and wife and had brought forth appellants 2 to 5 as their children was strongly relied upon for the purpose of drawing a presumption that such cohabitation was pursuant to a marriage between the first appellant and Velu Ambalam. Reliance in this connection was also placed by the learned counsel for the appellants upon the decisions in *Rajagopal Pillai* v. *Pakkiam Ammal*[1], *Sivachakravarthi* v. *Sivasankaran*[2], *Raghuvir Kumar* v. *Shanmughavadivu*[3], and *Badri Prasad* v. *Deputy Director, Consolidation*[4]. In meeting this argument, the learned counsel for the respondent contended that the non-mention of the name of P.W. 5 or that of the respondent as the wife or daughter of Velu Ambalam in his will or the mention of the first appellant as the wife of Velu Ambalam in the will would not be decisive, especially when the very will is being questioned and further the evidence adduced on behalf of the appellants does not probablise the marriage between the first appellant and Velu Ambalam. In addition, it is also pointed out that there is no acceptable independent evidence of any marriage having been celebrated between the first appellant and Velu Ambalam and having regard to the marriage between Velu Ambalam and Karupayee (P.W. 5), which has been established on the evidence to have taken place in 1936 or 1937, there cannot be any presumption in favour of a second marriage by the cohabitation of the first appellant with Velu Ambalam. In this connection, the learned counsel for the respondent relied upon the decisions in S.A. No. 592 of 1921, dated 18th January, 1924[1], *Nagarajamma* v. *State Bank of India*[2] and *Kumarayya Chettiar and another* v. *Cheyyalachi and others*[3].

1. (1968) 2 M.L.J. 411.
2. (1971) 84 L.W. 280.
3. (1970) 2 M.L.J. 193: A.I.R. 1971 Mad. 330.
4. (1978) 3 S.C.C. 527: A.I.R. 1978 S.C. 1557.

14. It is true that law does not favour concubinage, but that the presumption is in favour of a marriage when a man and a woman are shown to have cohabited continuously for a long number of years, though such a presumption is a rebuttable one and can be destroyed or weakened by the presence of other circumstances. It has already been found on the evidence that there was a marriage between Velu Ambalam and Karupayee (P.W. 5). The question is, whether in view of this, the presumption of a marriage between Velu Ambalam and the first appellant can be drawn merely from their having cohabited as man and wife, even though there is no evidence adduced in proof of a marriage. In this case there are certain circumstances which not only militate against the drawing of such a presumption, but even negative the same. Velu Ambalam had already been married to Karupayee (P.W. 5) and she had given birth to a daughter, the respondent herein, on 3rd November, 1943. It is the evidence of D.W. 1, that persons who would have normally attended the marriage, if such a marriage had taken place, had not been examined and other persons, who would have been invited to attend the wedding, if such a marriage had taken place, were not invited or intimated. No evidence of the first appellant having been treated by the community as the wife of Velu Ambalam has been made available. Excepting for the solitary instance in 1965 in the will Exhibit B-2, which is also questioned by the respondent, there had been no occasion of any acknowledgment by Velu Ambalam that the first appellant in his wife. The aforesaid circumstances

1. (1924) 46 M.L.J. (S.N.) 8.
2. (1961) 1 An.W.R. 65: A.I.R. 1961 Andh. Pra. 320.
3. (1972) T.L.N.J. 464.

compelled with the fact that Velu Ambalam had already been married to Karupayee (P. W. 5) would totally destroy the presumption in this case. No doubt, the decisions relied on by the learned counsel for the appellants would all support the drawing of such a presumption because the law does not favour concubinage. But such a presumption is a rebuttable presumption and not an absolute one, mere so in the present case, because Velu Ambalam had been already married to Karupayee (P.W. 5). in such a case, it has been pointed out in S.A. No. 592 of 1921, dated 18th January, 1921[1], that the presumption of a marriage from repute arises only where the evidence shows that the parties were living together for a sufficiently long period and were treated as husband and wife by their relations and the public, but that where a man had already married a woman and had children by her, there is no presumption that another lady with whom he is said to have lived is his wife or his children by her are legitimate. To similar effect is the decision in *Nagarajanna* v. *State Bank of India*[2]. Therein, it is pointed out that no doubt the presumption of law is in favour of marriage and against concubinage, but where a person is already married, no presumption of a second marriage arises by reason of long cohabitation. In the present case, apart from the fact that the circumstances pointed out earlier considerably weaken the drawing of such a presumption, there is really no scope for such a presumption at all.

15. The learned counsel for the appellants next contended that Velu Ambalam had executed a will under Exhibit B-2, dated 19th December, 1965 bequeathing the properties in favour of the appellants herein and that the execution of the will had also been found by the Court below and, therefore, the respondent ought to have been non-suited on this ground. As part of this submission, the learned counsel for the appellants stated that no probate in respect of the will of Velu Ambalam is required to be obtained, as under section 213 (2) of the Indian Succession Act, the provisions of section 213 would apply only in the case of wills made by any Hindu, Buddhist, Sikh or Jain falling under clauses (*a*) and (*b*) of section 57 of the Indian Succession Act. In this case, according to the learned counsel, the will executed by Velu Ambalam would not fall either within clause (*a*) or clause (*b*) of section 57 and there is therefore no scope for invoking section 213 (1) of the Indian Succession Act which requires a probate in order to establish rights under a will in a Court either as executor or legatee. In addition, it was the further submission of the learned counsel for the appellants that section 228 of the Indian Succession Act, does not compel the obtaining of a probate and that, therefore, the Court below was in error in holding that the will under Exhibit B-2 will have no effect as against the respondent, who has been established to be the heir of Velu Ambalam. The decision in *Manasing and Company* v. *Amad Kuchi and Co.*[1] was stated by the learned counsel for the appellants to have been rendered prior to the passing of the Indian Succession Act and would, therefore, be inapplicable. The learned counsel for the appellants also relied upon the decisions in *Sohan Singh* v. *Bhag Singh*[2], *Pevibai* v. *Motumalkalachand*[3], *Blackwood and Sons* v. *Parasuraman*[4] and *Bhaiya Ji* v. *Jogeshwari Dayal*[5].

16. In meeting these contentions, the learned counsel for the respondent would submit that Exhibit B-2 having been executed outside India, it may not fall within section 57 (*a*) or (*b*) of the Indian Succession Act, but that does not however mean that rights to property either as an executor or legatee under a will can be asserted before or recognised by Courts here without the obtaining of a probate under section 213 of the Indian Succession Act or even without at least a resealing of the probate obtained before a foreign Court under section 228 of the Indian Succession Act. In this connection reliance was placed by the learned counsel for the respondent on *Black-*

1. (1924) 46 M.L.J. (S.N.) 8.
2. (1961) 1 An.W.R. 65: A.I.R. 1961 A.P. 320.

1. (1894) I.L.R. 17 Mad. 14.
2. A.I.R. 1934 Lah. 599.
3. A.I.R. 1937 Sind 84.
4. I.L.R. (1959) Mad. 484: A.I.R. 1959 Mad. 410 at 421, para. 46.
5. A.I.R. 1978 All. 268.

wood and Sons v. *Parasuraman*[1] and *Hem Nalini* v. *Isolyne Sarojbashini*[2]. It was also further pointed out that in this case the probate proceedings culminating in Exhibit B-4 had been commenced and continued after the exchange of notices between the parties and the institution of the suit by the respondent and under these circumstances, no reliance can be placed on those proceedings. The mere obtaining of probate, according to the learned counsel for the respondent, would not suffice to dispense with the proof of the will and reliance in this connection was placed on the decisions in *Ram Lal* v. *Chanan Dass*[3] and *Bamapada Ghosh* v. *Satish Chandra*[4]. Even on the footing that no probate or an ancillary probate is necessary, the learned counsel for the respondent urged that the appellants have to establish the will Exhibit B-2 and that the evidence of the attestor D.W. 2 does not prove the execution or attestation of Exhibit B-2. Attention was drawn in this connection to the several circumstances in the evidence of D.Ws. which would render improbable his claim that he was present in Malaya and saw the execution of Exhibit B-2 by Velu Ambalam and attested the same.

17. In reply, the learned counsel for the appellants reiterated that section 213 (2) of the Indian Succession Act is clear and unless the case was one which was covered by clauses (*a*) and (*b*) of section 57, there was no need for a probate at all and submitted that the truth of the will as shown by the obtaining of a probate cannot be belittled because the proceedings were taken after the institution of the suit. A further point was also raised that the evidence of D.W. 2 regarding the execution of the will by Velu Ambalam is unassailable and that the recitals in the will fully support the case of the appellants and, therefore, the respondent should be non-suited.

18. While the appellants claim that they are entitled to the properties by reason of the will Exhibit B-2, dated 19th December, 1965 stated to have been executed by Velu Ambalam, the respondent would assert that the will has not been proved. The testator, Velu Ambalam died on 27th March, 1973. After the death of Velu Ambalam, the respondent had issued a notice claiming the properties of Velu Ambalam as his heir and that was under Exhibit A-3, dated 4th July, 1973, which had been received by the first and the second appellants on 5th July, 1973, as shown by Exhibits A-4 and A-5. Exhibit A-6, dated 17th July, 1973 is the reply notice sent by appellants 1 and 2 to the respondent, wherein they have set up the will Exhibit B-2, dated 19th December, 1965. The respondent herein on 23rd January, 1974, had filed O.P. No. 4 of 1974, which was later converted into O.S. No. 77 of 1974 and in the course of that suit, she had made a claim to the properties of the deceased Velu Ambalam as his sole daughter and heir. It is in the light of the aforesaid facts that the obtaining of the probate by the appellants under Exhibit B-4 on 5th November, 1974, has to be considered. A perusal of Exhibit B-4, which is only a photostat copy, shows that the will, dated 19th December, 1965, had been proved before the foreign Court on 4th August, 1974. It is evident that the obtaining of a probate by the appellants under Exhibit B-4 was long subsequent to the exchange of notices between the parties under Exhibits A-3 and A-6 and also after the institution of the suit on 23rd January, 1974, without any notice whatever to the respondent. It may be that if the respondent and been put on notice, she might have contested the proceedings for grant of probate. But that was not done for reasons best known to the appellants even though the appellants had by then knowledge not only of the execution of the will by Velu Ambalam, but also the claim of the respondent herein as the sole heir entitled to succeed to the properties of Velu Ambalam ignoring the will Exhibit B-2. The obtaining of a probate by the appellants after the institution of the suit and in the circumstances set out above cannot strengthen their case regarding the will executed by Velu Ambalam.

19. The scope of sections 57 and 213 of the Indian Succession Act (hereinafter referred to as the Act) may now be considered. The Act is intended to consolidate the law applicable to intestate and testamentary succession. In Part VI of the Act are enumerated the pro-

1. I.L.R. (1959) Mad. 484: A.I.R. 1959 Mad. 410 at 421 (para. 51) and at 424, para. 65.
2. A.I.R. 1962 S.C. 1471 at 1474.
3. A.I.R. 1938 Lah. 349.
4. A.I.R. 1943 Cal. 235.

visions relating to testamentary succession. Under section 57 of the Act, the provisions of Part VI set out in Schedule III are made applicable subject to restrictions and modifications, to wills and codicils made by Hindus, Buddhists. Sikhs or Jains under certain circumstances. Clauses (*a*) (*b*) and (*c*) of section 57 of the Act relate to different classes of wills. Clause (*a*) applies to those wills and codicils made on or after 1st September, 1970, within specified boundaries in the Presidencies of Bengal, Madras, and Bombay. Clause (*b*) similarly related to those wills and codicils which, though made outside the limits enumerated under section 57 (*a*), proceeded to deal with immovable properties situate within those limits. Clause (*c*), introduced by Amending Act XVIII of 1929, was intended to apply provisions of Part VI with reference to all wills and codicils made on or after 1st January, 1927, in any part of the then British India. It is thus seen that the primary object of section 57 of the Act is only to make applicable provisions of Part VI of the Act to certain clauses of wills. *Prima facie,* therefore, section 57 (*a*) and (*b*) of the Act, would be applicable only with reference to wills executed within India. Section 213 of the Act, on the other hand, prohibits the recognition of rights as an executor or legatee under a will without the production of a probate and sets down a rule of evidence and for as really part of the procedural requirement of the law of the forum. Construed in this manner, though it may be that wills executed outside India may not fall within the scope of section 57 (*a*) or (*b*) of the Act nevertheless in order to enable the Court to recognise the rights claimed under such a will, the obtaining of a probate of the will under which the right is claimed would be essential. In other words, in cases which would fall under section 57 (*a*) and (*b*) of the Act, the obtaining of a probate would be necessary, if the Court is called upon to recognise rights to properties claimed or asserted either as an executor or as a legatee under the will executed in India. With reference to wills executed outside India, in respect of which a foreign probate has also been obtained, the requirement of section 213 (1) of the Act would be satisfied by obtaining under section 228 of the Act an ancillary probate or what is termed in English Law as the resealing of the probate. Otherwise, the procedural requirement of the *lex fori* enacted under section 213 (1) of the Act may not be satisfied and it is only with a view to enable parties claiming under a will executed outside India to make claims with reference to properties situate in India, the procedure under section 228 of the Act has been prescribed. If this is not so, then as the probate obtained in respect of a will executed in a foreign country would be operative only within that country persons entitled to other properties under the will, which are situate outside the country where the will was executed and the probate also was obtained would be left without any means to assert their rights. It must also be remembered that section 228 of the Act is really in the nature of an enabling provision and when read with section 270 of the Act permits the obtaining of an ancillary probate. Section 270 of the Act is enacted on the principle that the presence of personal property of the deceased would be sufficient foundation of jurisdiction for purposes of granting probate. If, therefore, section 213 of the Act requires the production of a probate as a procedural requirement before recognition of the rights to property by Court under a will either as an executor or a legatee and if section 228 read with section 270 of the Act further provides for the obtaining of an ancillary probate in respect of wills executed and probated outside India for the purpose of enabling the executors and legatees to assert rights to the estate of a deceased in India, then the requirement as to the obtaining of a probate in this case in the shape of an ancillary probate cannot be stated to be unnecessary in view of section 57 (*a*) and (*b*) of the Act. In *Bhaurao Dadajirao* v. *Lakshmibai*[1], the testator was a subject of Baroda State and the will was also executed at Baroda. But the testator had left immovable properties in Belgaum. On an application for probate made before the District Judge, Belgaum, under section 56 of the Probate and Administration Act of 1881 (corresponding to section 270 of the Indian Succession Act it was dismissed holding that the proper place to prove the will was Baroda. On appeal it was pointed out that section 56 of the Probate and Administration Act, 1881, is general in nature and is irrespec-

1. (1896) I.L.R. 20 Bom. 607.

tive of the place where the will was executed or of the nationality of the testator or the place of his domicile. It is, therefore, obvious that in this case also, on the basis of section 270 of the Act, it would be open to the appellants claiming under the will to make an application for an ancillary probate and obtain the same and it cannot, therefore, be stated that the procedural requirement under section 213 of the Act cannot be complied with. That this is so is supported by the decision of Rajagopala Ayyangar, J., in *Blackwood and Sons* v. *Parasuraman*[1]. In that case, rights in a copy right were sought to be asserted on the basis of two wills probated in England. Section 213 of the Act was pleaded as a bar. In dealing with this plea, the learned Judge pointed out that the wills in those cases did not fall either under section 57 (*a*) or (*b*) of the Act, but nevertheless section 213 of the Act constituted a rule of evidence containing a procedural requirement of the *lex fori* and that section 213 of the Act primarily concerned itself with wills of Indian nationals and those executed in India, but section 228 of the Act was in the nature of an extension of that rule requiring the obtaining of a probate and enabled grant of an ancillary probate in the case of foreigners. It was also further pointed out that section 213 of the Act must also take in an ancillary probate which can be granted under section 228 of the Act, as otherwise, section 213 of the Act cannot be construed to contemplate a probate which no Court in India can issue as regards a foreign will, which has also been probated by a foreign Court. After pointing out these aspects, the learned Judge non-suited the plaintiffs on the ground that the plaintiffs should have obtained an ancillary probate under section 228 of the Succession Act and consequently their failure to produce such a probate is a bar to the enforcement of such right in the suit under section 213 of the Succession Act. That decision will squarely apply to the facts of this case as well. The reliance placed by the learned counsel for the respondent on the decision in *Hem Nalini* v. *Isolyne Sarojbashini*[2], is really of no assistance to him as in that case the impact of sections 7 (*a*) and (*b*) on 213 read in the light of sections 228 and 270 of the Act did not arise for consideration and further the parties therein do not appear to be Hindus to whom section 57 of the Act may apply. Therefore, the appellants' failure to obtain an ancillary probate under section 228 of the Act would be fatal to their claim under the will Exhibit B-2, a probate in respect of which had been issued by a foreign Court under Exhibit B-4.

20. Even on the footing that no probate is necessary the question whether the will had been established to have been executed by Velu Ambalam has to be considered as the original will Exhibit B-2 is before Court and the evidence of the attestor D.W. 2 has also been made available. Though the Court below was of the opinion that the evidence of D.W. 2 would establish the execution of the will Exhibit B-2, yet, there are certain circumstances in his evidence to which attention has been drawn, in the light of which his evidence has to be assessed. D.W. 2 is one of the two attestors to Exhibit B-2 and the other attestor Masilamani has not been examined. The evidence of D.W. 2 is to the effect that he is a native of Piranmalai and has been working as an Accountant in Kasia Pillai's shop at Malaya, wherein Karaikudi Masilamani also worked. He would state that he was residing at No. 126, Jalal Maharani Street and that he went to Malaya in 1956 and returned finally in 1974. The testator Velu Ambalam, according to D.W. 2 was staying in the same house and was having a money-lending business at door No. 18, in the same street. In December, 1965, according to D. W. 2 a will was executed by Velu Ambalam. A Tamilian advocate wrote the will, according to D.W. 2 and that when Velu Ambalam signed he and Masilamani were present and both of them are stated to have attested the will in the presence of Velu Ambalam. In the course of the cross-examination, D.W. 2 admitted that though he had a passport for having gone to Malaya, he had not brought it. He admitted that there was no record to show that he was living in Jalal Maharani Street; and that he has no letters addressed to him at that place. D.W. 2 further frankly admitted that there is no material to show that Velu Ambalam also lived in Jalal Maharani Street and also that he had business in that street. D.W. 2 stated that he did not know

1. I.L.R. (1959) Mad. 484: A.I.R. 1959 Mad. 410.
2. A.I.R. 1962 S.C. 1471.

who was consulted as regards the will, but that the will had been written already and he was called for attesting it since he was a friend of Velu Ambalam. D.W. 2 was unable to give the name of the lawyer in whose office Exhibit B-2 was written. Though he would state that the lawyer's clerk read out the terms of the will, he admitted that neither the advocate nor his clerk signed the will. D.W. 2 finally admitted that he was dismissed from Kasia Pillai's shop for having misappropriated funds and that he had given his properties to Kasia Pillai to make good the amounts misappropriated.

21. The aforesaid evidence of D.W. 2 raises very serious doubts about his presence in Malaya at the time of the execution of the will Exhibit B-2. D.W. 2 has admitted having a passport to show his movements, but that has not been available. Though he had stated that Velu Ambalam and he were residing at No. 126, Jalal Maharani Street and that Velu Ambalam had money-lending business at door No. 18 in the same street, no materials have been produced in support of that. Apart from this, it is the clear admission of D.W. 2, that there are no records to show his living in Jalal Maharani Street and that there is also no material to show that Velu Ambalam lived in the same street or carried on business. Thus, the living of D. W. 2 and Velu Ambalam in the same house and thereby their becoming friends which led to the request by Velu Ambalam to attest Exhibit B-2 have not been established at all. That Velu Ambalam was there at that time has not been proved by the appellants and nothing prevented the production of the passport of Velu Ambalam to show whether he was in Malaya in December, 1965. No reasons have been given for the non-examination of Masilamani. Even the name of the advocate who is stated to have drawn up the will is not known to D.W. 2. If really the will had been drawn up in the manner spoken to by D.W. 2, then he must have been in a position to give at least the name of the lawyer. The advocate or his clerk who is stated to have read out the terms of the will have not appended their signature to the will. That the testimony of D.W. 2 is unacceptable and unreliable is made clear by his candid admission that he had misappropriated funds while working in the shop of Kasia Pillai and he had given his properties also towards those amounts The will also contains certain doubtful features. It is rather strange that the testator did not even know the age of the first appellant and of his two daughters. It is usual to give some reasons for the execution of the will, as for instance, the ill-health of the testator or the other similar reasons. It is found that no such thing is mentioned in the will. Above all, it is not clear from the evidence as to why Velu Ambalam was particularly ancious to disinherit the respondent herein, who was none other than his own daughter. This is strikingly unnatural. That D.W. 2 had been called by Velu Ambalam for attesting the will because he happened to be a friend of his has not been established and, therefore, the further evidence of D.W. 2 to the effect that as a friend of Velu Ambalam he went and attested the document in the office of an unknown lawyer is very difficult to accept. The cumulative effect of these circumstances considered in the light of the very unsatisfactory evidence of D.W. 2 would lead to the conclusion that Exhibit B-2 has not been shown to have been duly executed by Velu Ambalam and attested by D.W. 2 and, therefore, the appellants cannot, on the basis of such a will, claim rights to the properties of Velu Ambalam. The conclusion of the Court below that no rights would be available to the appellants on the strength of the will Exhibit B-2 is, therefore, quite justified.

22. In the Memorandum of Cross-Objections filed by the respondent, the only point that is urged by her learned counsel is that having decreed the suit for recovery of possession instituted by the respondent in relation to A-1 and A-2 schedules, the Court below had declined to grant the relief of mesne profits. A perusal of the judgment of the Court below reveals that this matter has completely escaped its attention No reasons have been given as to why the respondent is not entitled to mesne profits as claimed by her. The failure of the Court below to award a decree for mesne profits in favour of the respondent is, therefore, erroneous.

23. In the result, the apeal fails and is dismissed and the Memorandum of Cross-Objections is allowed. There will be no order

as to costs in the appeal as well as the Memorandum of Cross-Objections.

S.J. —— *Appeal dismissed; Memorandum of cross-objection allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and S. Natnar Sundaram, JJ.*

Daisy Boaz .. *Appellant**

v.

The Special Tahsildar (L.A.) and L.A.O. Industrial Estates, Saidapet, Madras-15 .. *Respondent.*

(A) *Civil Procedure Code (V of* 1908), *Order* 41, *rule* 1—*Scope and applicability—Common judgment on seventeen references in Land Acquisition matters having different numbers —Different decrees drafted —Appeal filed by one claimant—Appeal filed with certified copy of the decree—As per endorsement on the decree appeal out of time—Appeal by other claimants with prescribed copies of the judgments—Appeals in time — Whether can be taken into consideration for saving limitation.*

(B) *Limitation Act (IX of* 1908), *section* 12 —*Applicability.*

As many as seventeen references under the Land Acquisition Act were disposed of by a common judgment bearing different numbers of different claimants. Different decrees were drafted. The present appeal was filed by one claimant alone. The printed copies of the judgments were not filed and the production of the same was sought to be dispensed with. Certified copy of the decree alone was filed with the appeal. As per the endorsements found on the certified copy of the decree filed along with the present appeal, the appeal was out of time by forty-three days. The office pointed out that a petition to condone the delay in filing the appeal must be filed. The appellant contended that since another claimant in the batch had preferred an appeal in time with the required printed copies of the judgment, the endorsements found on those printed copies of the common judgment will enure to the benefit of the present appellant also and if time was calculated as per those endorsement the present appeal, which was also directed against the common judgment, will be within time.

Held: Computation of time for the purpose of preferring an appeal is a matter which squarely comes within the purview of Part III of the Limitation Act. Section 12 speaks about the time taken for obtaining copies. That provision by itself does not lay down that copies of judgment and decree should be filed along with the appeal or revision etc. That requirement as well as dispensation thereof have got to be gleaned from the procedural law such as the Code of Civil Procedure, and other relevant rules. That has nothing to do with and will not govern the law of limitation. [*Para.* 4.]

Sub-sections (2) and (3) of section 12 are relevant and a plain reading of the provisions shows that they relate to an appeal or an application for leave to appeal or for revision or for review of a judgment and deduction of time taken for obtaining a copy of the judgment or decree, sentence or order concerned. Normally, the nexus for computation of time could be only between that appeal and the copy filed along with it. In *State of Madras* v. *Muthurethinam,* (1970) 1 M.L.J. 608: A.I.R. 1970 Mad. 353, the common appellant having filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of all the appeals, the benefit of exclusion on the basis of the endorsements of the time taken in furnishing certified copy of the judgment was held not merely to be available to the appeal in which the certified copy of the judgment was filed but also to the other connected appeals filed by the same party against the common judgment. There should be a common judgment but it may cover different proceedings, the party or parties appealing should be common to all the appeals, and different appeals should have been preferred simultaneously on the same day. The requisite printed copies of the judgment could be filed in one of the different appeals and dispensation from filing of the requisite printed copies in the other appeals, could be sought for and obtained. Though the endorsement on the certified copies of the decrees filed in the appeal other than that in which requisite printed copies of the judg-

*App.S.R. No. 115639 of 1981.

30th November, 1982.

ments have been filed will make those appeals out of time, they can avail of the endorsement found on the requisite printed copies of the judgment filed in that appeal to bring all the appeals within the period of limitation. If the parties are totally different and they prefer different appeals either on the same day or on different dates against the common judgment, this rule cannot be extended to cover such a contingency, the main reason being there is no common nexus between the appeals as well as the copies filed. Equally so, if the party or parties are the same in the different appeals, and if the appeals are not preferred simultaneously on the same day but on different dates, some after the expiry of the period of limitation, the rule could not be availed of to get over the law of limitation. The basis for spelling out the rule by the Full Bench is that, the party or parties being the same in the different appeals directed against the common judgment and they having been preferred simultaneously on the same day, the party or parties can avail of the endorsements on the copies filed in one such appeal. There is no warrant to extend the rule to cover a case where different appeals have been preferred by different parties and that too, on different dates, though against a common judgment. The appeal as it stands filed along with the certified copy of the decree alone is beyond time and therefore there is a necessity to file an application to condone the delay. The office will return the papers and it is upto the appellant to re-present the same along with the requisite petition to condone the delay. [*Para.* 4.]

Cases referred to:—

Aminuddin Sahib v. *Pyari Bi,* (1920) I.L.R. 43 Mad. 633: 38 M.L.J. 340: 55 L.W. 370; *Mt. Nibi Umtul Rasul* v. *Ram Charan,* A.I.R. 1920 Pat. 535; *State of Madras* v. *Muthurethinam,* (1970) 1 M.L.J. 608: 83 L.W. 424: A.I.R. 1970 Mad. 353; *Ramkishan Shastri* v. *Kashi Bai.* (1907) I.L.R. 29 All. 265.

Appeal sought to be preferred against the decree of the Court of the First Additional Subordinate Judge, Chingleput, dated 8th May, 1981 in C.R.O.P. No. 119 of 1980.

G. John Arthur, for Appellant,

The Order of the Court was made by

Nainar Sundaram, J.—The claimant in C.R.O.P. No. 119 of 1980 on the file of the First Additional Subordinate Judge, Chengalpattu, is the appellant in the present appeal S.R. No. 115639 of 1981. The said C.R.O.P. was a reference under the Land Acquisition Act. The First Additional Subordinate Judge, Chengalpattu, disposed of by a common judgment as many as seventeen references, bearing different C.R.O.P. numbers of different claimants, including the above reference bearing C.R.O.P. No. 119 of 1980 of the present appellant The present appeal has been filed on 2nd November, 1981. Admittedly, there are different decrees relating to different claimants. In the present appeal, printed copies of the common judgment have not been filed and production of the same is being sought to be dispensed with. The certified copy of the decree alone has been filed along with the appeal. As per the endorsements found on the certified copy of the decree in C.R.O.P. No. 119 of 1980 filed along with the present appeal, the appeal is out of time and the note of the office of this Court points out that it is out of time by forty-three days. Hence, the office returned the papers requesting the counsel for the appellant to file the requisite petition to condone the delay in filing the appeal. However, learned counsel for the appellant would take a stand that A.S. No. 213 of 1982 has been preferred by another claimant earlier on 30th October, 1981, as against C.R.O.P. No. 111 of 1980, one in the batch, and the requisite printed copies of the judgment have been filed in that appeal, and as per the endorsements found on those printed copies of the common judgment, the present appeal, which is also directed against the common judgment is within time. This has necessitated the office of this Court to place the matter before us for orders.

2. We are not concerned with the dispensation of the production of the requisite printed copies of the common judgment in the present appeal for the purpose of deciding the question as to whether the appeal as preferred by the appellant in within time or beyond time as per the endorsements found on the certified copy of the decree in C.R.O.P. No. 119 of 1980, which alone has been filed along with the present appeal and against which decree alone the present appeal has been preferred. If the endorsements found on the said certi-

fied copy of the decree are taken note of, the present appeal is clearly out of time. However, Mr. K. Sridhar, learned counsel for the appellant, would contend that the endorsements found on the printed copies of the common judgment filed in the other appeal. A.S. No. 213 of 1982, preferred by another claimant against another C.R.O.P. No. 111 of 1980 will enure to the benefit of the present appellant also, and if the time is calculated as per the enforcements found therein, the present appeal will be within time.

3. Learned counsel for the appellant drew our attention to a few authorities. But in our view, they are not by themselves helpful to decide the present question. In *Aminuddin Sahib* v. *Pyari Bi*[1], a Division Bench of this Court consisting of Sir John Wallis, CJ., and Krishnan, J., pointed out that an appellant, who is required to file with his memorandum of appeal a copy of the decree appealed from, may file a copy obtained by another party; and under section 12 (2) of the Limitation Act, hereinafter referred to as the Act, he is entitled to a deduction of time taken to obtain that copy. This is not the position in the present case. The appellant has not filed in the present appeal any copy either of the judgment or the decree obtained by another party, so that the endorsements found therein could make the appeal filed within time, but objection is being taken by the office on the ground that it is a copy obtained by another party and the endorsements thereon cannot be availed of by the present appellant. Learned counsel also relied on the judgment of a Division Bench of the Patna High Court in *Mt. Nibi Umtul Rasul* v. *Ram Charan*[2]. In the said decision, the Division Bench pointed out that one copy of the common judgment would suffice though several appeals were filed against the same common judgment by the same person and the time for obtaining that copy will be excluded in all appeals. This decision also does not in any way help the appellant herein. This is not a case where different appeals have been filed by the same party against a common judgment. The third authority relied on by the learned counsel is that of a Full Bench of this Court in *State of Madras* v. *Muthurethinam*[1]. Learned counsel fairly conceded that the question which has arisen before us was not at all decided by the Full Bench. The ratio of the Full Bench runs as follows:

> "We are of the view, in these cases, that the common appellant having filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of all the appeals, the benefit of exclusion, on the basis of the endorsements, of the time taken in furnishing the certified copy of the judgment would not merely be available to the appeal in which the certified copy of the judgment was filed but would enure also to the other connected appeals filed by the same party against the common judgment."

There are observations in the decision of the Full Bench which militate against the stand taken by the learned counsel. In the course of the arguments before the Full Bench, the discussion was sought to be widened by stating that once a certified copy of the judgment and decree furnished the basis for exclusion under section 12 (2) and (3) of the Act, it would enure to the benefit of not merely the appellant who had secured them but also to other parties to the judgment appealed against, whether or not they filed appeals together or separately on the same day or on different dates. The learned Judges who constituted the Full Bench, having regard to the limited scope of the reference before them, in the light of the facts, did not think it necessary to cover that area and express their view. However, after referring to *Animuddin Sahib* v. *Pyari Bi*[2] and *Ramkishan Shastri* v. *Kashibai*[3], the learned judge indicated that they are not inclined to think that the said authorities contribute to such a proposition.

4. Computation of time for the purpose of preferring an appeal is a matter which squarely comes within the purview of Part III of the Act. Section 12 speaks about the time taken for obtaining copies. That provision, by itself,

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1. (1920) I.L.R. 43 Mad. 633: 38 M.L.J. 340: 11 L.W. 370.
2. A.I.R. 1920 Pat. 535.

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1. (1970) 1 M.L.J. 608: 83 L.W. 424: A.I.R. 1970 Mad. 353.
2. (1920) I.L.R. 43 Mad. 633: 30 M.L.J. 340.
3. (1907) I.L.R. 29 All. 265.

does not lay down that copies of judgment and decree should be filed along with the appeal or revision, etc. That requirement as well as dispensation thereof have got to be gleaned from the procedural law such as the Code of Civil Procedure and other relevant rules. That has nothing to do with and will not govern the law of limitation. Sub-sections (2) and (3) of section 12 of the Act are relevant and they read as follows:

> "12 (2). In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree sentence or order appealed from or sought to be revised or reviewed shall be excluded.
>
> (3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded also shall be excluded'.

A plain and a simple reading of the above provisions conveys the meaning that they relate to an appeal or an application for leave to appeal or for revision or for review of a judgment and deduction of time taken for obtaining a copy of the judgment or decree, sentence or order concerned. Normally, the nexus for computation of time could be only between that appeal and the copy filed along with it. However, the Full Bench, in the decision referred to above, dealt with a situation where several appeals were preferred from a common judgment by the same party simultaneously on the same day and construing the provisions of Order 41, rule 1 of the Code of Civil Procedure as well as section 12 (2) of the Act, and by taking a liberal and practical view on the contingencies existing in that case, expressed the ratio extracted above. We are not prepared to extend the ratio beyond that limit. There should be a common judgment, but it may cover different proceedings; the party or parties appealing should be common to all the appeals; the different appeals should have been preferred simultaneously on the same day; requisite printed copies of the judgment could be filed on one of the different appeals and dispensation of the filing of the requisite printed copies of the judgment in the other appeals could be sought for and obtained. Though the endorsements on the certified copies of the decree filed in the appeals other than that in which the requisite printed copies of the judgment have been filed will make those appeals out of time, yet, the appellant or appellants being the same, they can avail of the endorsements found on the requisite printed copies of the judgment filed in that appeal to bring all the appeals within the period of limitation. If the parties are totally different and they prefer different appeals either on the same day or on different dates against the common judgment, this rule cannot be extended to cover such a contingency, the main reason being there is no common nexus between the appeals as well as the copies filed. Equally so, even if the party or parties are the same in the different appeals and if the appeals are not preferred simultaneously on the same day, but on different dates, some after the expiry of the period of limitation, we do not think that this rule could be availed of to get over the law of limitation. The basis for spelling out the rule by the Full Bench is obvious, and that is, the party or parties being same in the different appeals directed against the common judgment, and they having been preferred simultaneously on the same day, the said party or parties can avail of the endorsements on the copies of the judgment filed in one such appeal. This rule is meant to cover only these contingencies and as we stated above, there is no warrant to extend the rule to cover a case where different appeals have been preferred by different parties and that too, on different dates, though against a common judgment. In this view of the matter, we are not able to sustain the submissions made by the learned counsel for the appellant to get over the question of limitation. Hence, we are of the opinion that the appeal as it stands filed along with the certified copy of the decree alone is beyond time and, therefore, there is a necessity to file an application to condone the delay. The office will return the papers and it is up to the appellant to represent the same along with the requisite petition to condone the delay.

R.S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

C. Ganapathy ... *Petitioner**

v.

R. Anbalagan and others ... *Respondents.*

(A) *Tamil Nadu Cultivating Tenant's Protection Act (XXV of 1955), section 3* (4) (a) *and rule* 8 (ii) (a) *of the Rules framed under the Act—Petitioner cultivating tenant—Petition for eviction on ground of arrears of rent—Notice sent by registered post to petitioner—Refuseal to receive the same—Revenue Court accepting endorsement on postal cover as sufficient proof of service—Tenant set* ex parte—*Landlord examined and order passed—Tenant directed to deposit arrears within 15 days—Order of the Revenue Court not however communicated to thet enant—Amount not deposited—Eviction order passed—Order whether liable to be quashed.*

(B) *Civil Procedure Code (V of 1908), Order 5—Applicability to proceedings before Revenue Court.*

(C) *Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), and rule 8* (ii) (a) *"As far as possible"—Meaning of.*

The petitioner was a tenant within the meaning of the Tamil Nadu Cultivating Tenants' Protection Act. The landlords filed application for eviction before the Revenue Court alleging that the petitioner was in arrears of rent. Notice was sent in the first instance itself by registernd post to the tenant and it was refused and due endorsement was made on the postal cover. There was no attempt to serve the tenant by personal service. The Revenue Court accepted the postal endorsement as sufficient proof of service and set the tenant, *ex parte* andpassed an order accepting the evidence of the landlords and directed the cultivating tenant to deposit Rs. 1,200 within 15 days from that date (11th June, 1982), The order of the Revenue Court was not communicated to the cultivating tenant. The Revenue Court took up the matter for orders on 12th July, 1982, and since the cultivating tenant did not pay the lease arrears as per the order of 11th June, 1982 ordered eviction. This order of the Revenue Court was challenged in the present revision.

Held:- Neither the provisions of the Act nor of the Rules lay down the procedure for issue and service of summons. It is only in this light due significance and effect has to be given to the expression 'as far as possible' occurring in rule 8 (*ii*) of the Rules. The principles of justice require that an adjudication of a controversy should take place in the presence of both the parties and when proceedings are initiated by one party against, another, the presence of the 'another' must be secured, so as to afford him an opportunity to make his say in the matter of grievance expresed by the party initiating the proceedings and it is only with this end in view, the imperative provisions of issue and service or summons of notice got adumbrated in the procedural law and this is what has been done in Order 5 of the Code. In the absence of a rule of exclusion, express or implied, either in the Act or in the Rules, it has to be held that there is no escape from Order 5 of the Code with regard to issue and service of notice in the proceedings before the Revenue Court. [*Para. 7.*]

On the date when the proceedings were initiated against the cultivating tenant by the landlords before the Revenue Court, rule 9 in its original form and rule 19-A as amended in this State governed the situation. So long as the matter comes within the ambit of rules 9 to 19-A the Court could order service of summons by registered post only in addition to and simultaneously with the issue of summons for service on the defendant personally. Sub-rule (2) of rule 19-A cannot be read as casting a mandate on the Court to accept the postal endorsement of refusal as sufficient proof of service

*C. R. P. No. 3323 of 1982.

19th November, 1982.

on the defendant in this State. Discretion remains with the Court to accept the postal endorsement of refusal as proper service.

[*Para. 17.*]

While clause (1) of rule 19-A, Order 5 of the Civil Procedure Code, with the proviso thereto enjoins upon the Court, if it thinks necessary to order postal service, only in addition to and simultaneously with personal service, clause (2), with appropriate amendment in this State, has given the discretion to the Court to accept or not to accept the postal endorsement either of the acknowledgment or of refusal, as sufficient proof of service. It can be taken that personal service is the normal and inescapable rule when the matter remains within the ambit of rules 9 to 19-A and service by registered post, whereever the Court thinks it necessary can only be in addition to and simultaneous with personal service. In the present case there has been a clear transgression of the express mandates of the relevant provisions of Order 5 of the Code and hence, the Revenue Court committed a grave error of law when it chose to proceed against the cultivating tenant *ex parte*. [*Para. 20.*]

When there is a blatant omission to follow the procedural imperatives by the Revenue Court, the fact that the cultivating tenant was not inclined to follow up his other remedy to get the *ex parte* order set aside need not stand in the way of the High Court exercising the power of revision.

[*Para. 19.*]

Cases referred to :—

Hinde v. *Brayan*, (1884) I. L, R. 7 Mad. 52 ; *Rani* v. *Deputy Director of Consolidation*, A. I. R. 1959 All 528 ; *Muthiah Nattar* v. *Ibrahim Rowther*, (1968) 1 M. L. J. 190 ; *K. Gounder* v. *Vannimuthu*, (1976) 1 M. L. J. 146 : 89 L. W. 84 : A. I. R. 1976 Mad. 269 ; *Kiroda Sundari Dasi* v. *Navin Chandra Saha*, A. I. R. 1916 Cal. 600 ; *K. A. Desai & Company* v. *Vijayainhji*, A. I. R. 1954 Sau. 84 ; *Murugayyan Kangiar* v. *Marudayyammal*, (1956) 2 M. L. J. 86 : (1956) 69 L. W. 563 ; *Sri Krishna Rice Mills* v. *Rajagopala*, (1958) 2 M. L. J. 143 : 71 L. W. 443 : A. I. R. 1958 Mad. 522 ; *Pichai Ammal* v. *Vellayya*, I. L. R. (1963) Mad. 672 : 76 L. W. 24 : A. I. R. 1963 Mad. 198 ; *Mohan Traders* v *A. V. M. Cattle and Poultry Feed Manufacturing Industries*, I. L. R. (1980) 1 Ker. 512 ; *Krishna Ayyar* v. *Kuppan Ayyangar*, (1970) I. L. R. 30 Mad. 54 (F. B.): 16 M. L. J. 479 ; *Ananthu* v. *Kesavayya*, (1920) 39 M. L J. 697 : 12 L. W. 507 : A. I. R. 1920 Mad. 962 ; *Levai Sahib* v. *Ammenammal*, (1923) 45 M. L. J. 805 : 79 I. C. 968 : A. I. R. 1924 Mad. 107 ; *Munassar Bin* v. *Fatima Begum*, A. I. R. 1975 A. P. 366.

Petition under section 6 (*B*) of the Tamil Nadu Cultivating Tenants' Protection Act read with section 151 of the Code of Civil Procedure, praying the High Court to revise the order of the Special Collector, Revenue Court, Tirunelveli, dated 12th July, 1982, and made T. C. T. P. No. 212 of 1982.

M. Srinivasan, for Petitioner.

S. Sivasubramaniam, P. Pandi, for Respondents.

The Court made the following

ORDER.—The petitioner is a cultivating tenant within the meaning of the Tamil Nadu Cultivating Tenants' Protection Act XXV of 1955, hereinafter referred to as the Act. The respondents herein are the landlords within the meaning of the Act. The landlords filed application T. C. T. P. No. 212 of 1982 on the file of the Special Deputy Collector, Revenue Court, Tirunelveli, under section 3 (4) (*a*) of the Act. The ground alleged for eviction is arrears of rent in respect of the lands concerned, for the year 1980-81. From the order passed by the Revenue Court dated 11th June, 1982, it is found that notice was sent by registered post to the cultivating tenant and he refused to receive the same, as could be seen from the postal endorsement on the cover of the notice sent. The Revenue Court accepted this endorsement as sufficient proof of service and set the cultivating tenant *ex parte* and passed an order on 11th June, 1982, accepting the evidence of the second of the landlords who was examined in the case, and ordered the cultivating tenant to deposit Rs. 1,200 towards the lease arrears in respect

of the lands concerned due to the landlords for 1980-81, within 15 days from that date. This order of Revenue Court was admittedly not communicated to the cultivating tenant. The Revenue Court took up the matter for orders on 12th July, 1982, and since the cultivating tenant did not pay the lease arrears as per the order dated 11th June, 1982, ordered the eviction of the cultivating tenant from the lands concerned. This order of the Revenue Court is the subject-matter of challenge in the present revision.

2. Mr. M. Srinivasan, learned counsel for the cultivating tenant, would submit that rule 8 (*ii*) (*a*) of the Rules framed under the Act, hereinafter referred to as the Rules, directs that the proceedings of the Revenue Court shall be summary and shall as far as possible be governed by the provisions of the Code of Civil Procedure, 1908, hereinafter referred to as the Code, with regard to the issue and service of summons and in the instant case, there had been a transgression of the concerned provisions of the Code with regard to the issue and service of summons and hence, the entire process adopted by the Revenue Court in proceeding *ex parte* against the cultivating tenant is tainted with illegality and material irregularity, and on this ground, learned counsel seeks interference in revision. I shall deal with the submissions made by the learned counsel for the cultivating tenant in this behalf as well as the counter submissions made by Mr. S. Sivasubramaniam, learned counsel for the landlords in seriatim.

3. Mr. M. Srinivasan, learned counsel for the cultivating tenant, would state that the provisions of Order 5 of the Code will apply with equal force to the proceedings before the Revenue Court under the Act with regard to the issue and service of summons and he wants this Court to construe the expression 'as far as possible' occurring in rule 8 (*ii*) of the Rules as conveying the ameaning that in the absence of any inhibition express or implied in the Act or the Rules, Order 5 of the Code will have to govern the issue and service of summons under the Act and the Rules. As against this, Mr S. Sivasubramaniam, learned counsel for the landlords, would state that the expression 'as far as possible' need not be stretched to spell out a proposition that the provisions of Order 5 of the Code will have to be strictly applied and the learned counsel would further submit that a discretion still lay with the Revenue Court to adopt the said provisions according to exigencies.

4. In *Hinde* v. *Brayan*[1], a Division Bench of this Court, consisting of Innes and Muthuswami Ayyar, JJ., had occasion to consider the meaning to be attached to the expression 'as far as may be' occurring in section 587 of the Old Code of Civii Procedure with reference to dealing of second appeals by the High Court. In that case, the High Court in second appeal, called for a finding of fact from the lower appellate Court. Sections 566 and 567 which regulated the procedure upon the finding on an issue sent down by the appellate Court formed part of Chapter XLI of the Old Code and the provisions of that Chapter were made applicable by Chapter XLII to proceedings in appeals from appellate decrees 'as far as may be'. Innes, J., delivering the judgment of of the Division Bench, observed as follows :

> "If these words had the wide meaning of 'as far as possible' we think it could not be contended that we are precluded from going into the facts in the present case. But we think the meaning must be as far as in consistent with proceedings in second appeal".

The above observations, to a very great extent, indicate that a wider connotation and not a restricted one should be attached to the expression 'as far as possible in contrast to 'as far as may be'. Hence, it is permissible to lay down that by virtue of the expressions 'as far as possible' occurring in rule 8 (*ii*) of the Rules, the entirety of Order 5 of the Code with regard to the issue and service of summons will have to govern the proceedings before the Revenue Court under the Act.

5. In *Rani* v. *Deputy Director of Consolidation*[2], the meaning and effect to be annexed to the expression 'as possible' occurring in Uttar Pradesh Consolidation of Holdings Act, 1953, came up for consideration before Dhawan, J., and the learned Judge opined as follows :

> "This phrase really means that the principles are to be observed unless it is

1. (1884) I. L. R. 7 Mad. 52.
2. A. I. R. 1959 All. 528.

not possible to follow them in the particular circumstances of a case".

6. In *Muthiah Nattar* v. *Ibrahim Rowther*[1], Ramaprasada Rao, J. as he then was, dealt with the question of addition of parties as contemplated under rule 8 (*ii*) (*e*) of the Rules and the following observations of the learned Judge are worth noting:

"Rule 8 of the Madras Cultivating Tenants Protection Rules, ordains that every Court constituted under the Madras Cultivating Tenants' Protection Act shall have the powers exercisable by a civil Court in the trial of suits and in particular provides, under rule 8 (*ii*), that the proceedings before the Rent Court shall 'as far as possible', be governed by the provisions of the Code of Civil Procedure, 1908. We are here concerned with the addition of parties expressly provided for in rule 8 (*ii*) (*e*) of the Madras Cultivating Tenants' Protection Rules. It is common ground that unless there is anything in the Madras Cultivating Tenants' Protection Act or the Rules prohibiting the application of any provisions of the Code of Civil Procedure, the Code is applicable to the proceedings in the Revenue Court. No doubt, the provisions of the Code of Civil Procedure, ought not to be strictly iron-jacketed and rendered inelastic. As the Code is mainly concerned with the procedural law, intended to facilitate justice, its application has to be sought instead of being avoided, if it is so required in the interests of justice."

In *K. Gounder* v. *Vannimuthu*[2], Gokulakrishnan, J., referred to the observations of Ramaprasada Rao, J., as he then was, in the above decision and opined that the provisions of the Code are in all force applicable to service of summons in respect of parties before the Revenue Court under the Act.

7. Neither the provisions of the Act nor of the Rules lay down the procedure for issue and service of summons. It is only in this light, we have to give due significance and effect to the expressions 'as far as possible' occurring in rule 8 (*ii*) of the Rules. The principles of justice require that an adjudication of a controversy should take place in the presence of both the parties and when proceedings are initiated by one party against another, the presence of the 'another' must be secured, so as to afford him an opportunity to make his say in the matter of grievance expressed by the party initiating the proceedings and it is only with this end in view, the imperative provisions of issue and service of summons or notice got adumbrated in the procedural law and this is what has been done in Order 5 of the Code. In the absence of a rule of exclusion, express or implied, either in the Act or the Rules, I have to hold, taking note also of the judicial pronouncements referred to above that there is no escape from Order 5 of the Code with regard to issue and service of notice in proceedings before the Revenue Court under the Act.

8. Mr. M. Srinivasan, learned counsel for the cultivating tenant, submits that the Revenue Court acted in utter disregard of the relevant provisions of Order 5 of the Code, with regard to service of notice on the cultivating tenant; and it ought not to have resorted to the process of sending notice by registered post alone, and taken the postal endorsement of refusal as proof of service. It is not in dispute that notice was sent by registered post in the first instance itself. On the other hand, Mr. S. Sivasubramaniam, learned counsel for the landlord, wants this Court not to take exception to the procedure adopted by the Revenue Court in sending the notice by registered post only, and the learned counsel does not want to make any distinction between notice being taken in the first instance and subsequently, and wants to sustain the procedure adopted by the Revenue Court as perfectly in consonance with the relevant provisions of Order 5 of the Code.

9. Before I deal with the legal aspect, certain facts which are not disputed before me, need restatement. There was no attempt at all to serve the cultivating tenant by personal service. Straightway, in the first instance itself, service by registered post has been resorted to, and the postal endorsement of refusal has been treated as proof of service and the cultivating tenant, on the hearing date, was set *ex parte*.

1. (1968) 1 M. L. J. 190.
2. (1976) 1 M. L. J. 146 : 89 L. W. 84 : A. I. R. 1976 Mad. 269.

10. The relevant rules in Order 5 of the Code have undergone several changes, both at the Central and State level. But, we are concerned with the rules, as they stood on the relevant dates when proceedings were initiated before and notice was sent by the Revenue Court. But, it will be worthwhile to refer to the rules, as they stood earlier and the decisions rendered construing them for the purpose of appreciating the implications and import of the rules as they stand today. Rules 9 to 19 of Order 5 of the Code lay down the process for service of summons personally on the defendant. Of course, certain charges were introduced in rule 9 in this State earlier, bringing in service of summons by post on the defendant and which changes now stand omitted and I will have occasion to refer to them, presently. Rule 9 originally had two clauses and it stood as follows:

> "9 (1). Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.
>
> (2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct."

The rules which followed rule 9, upto rule 19, dealt with the procedure to be adopted for securing service of summons contemplated under rule 9. As rule 9 stood originally as aforesaid as well as in rule 19, there was no specific reference to service of summons by post. Yet, my attention has been drawn to two decisions where it was recognised that the Court had discretion to order service of summons by post.

11. In *Kirode Sundari Dasi* v. *Navin Chandra Saha*[1], a Division Bench of the Calcutta High Court, referring to the expressions 'order such service as it thinks fit' occurring in rule 19, opined that it is open to the Court, even where there has been a technical compliance with the provisions of rule 17 to order service in another mode, if the Court thinks fit to do so in the interests of justice, and the Division Bench indicated registered post as a mode of serving the summons in a case of the description dealt with by it.

1. A. I. R. 1916 Cal. 600.

12. In *K. A. Desai & Company* v. *Vijaysinhji*[1]. Chhatpar, J., took note of the expression 'unless the Court otherwise directs' occurring in rule 9 as well as the expressions 'or such service as it thinks fit' occurring in rule 19 and held that they enabled the Court to serve notice by post. The learned Judge referred to the other rules, namely, rules 20, 25 and 30 (3) of Order 5 of the Code, contemplating service of summons by post. But they would come into play at different contingencies, which did not exist in the present case. Mr. S. Sivasubramaniam, learned counsel for the landlords, would place reliance on the above pronouncements to state that the Court can order service of summons by post only, without resorting to service of summons personally, and wants to sustain the action of the Revenue Court in ordering service of notice by post only on the cultivating tenant and that too, in the first instonce. How much assistance the learned counsel could derive from these pronouncements for his proposition will be seen when the subsequent changes introduced into the rules, and in particular rule 19-A introduced by Central Act CIV of 1976 are discussed in the following paragraphs. That would also cover the aspect as to how far the Court can treat the postal endorsement of refusal as proof of service.

13. On 23rd October, 1959, sub-rule (3) was inducted into rule 9 in this State and the said sub-rule read as follows :

> "(3) Where the defendant resides in India whether within jurisdiction of the

1. A. I. R. 1954 Sau. 84.

Court in which the suit is instituted or not, the Court may direct the proper officer to cause a summons under this order to be addressed to defendant at the place where he ordinarily resides or carries on business or works for gain and sent to him by registered post prepaid for acknowledgment. An acknowledgment purporting to be signed by the defendant shall be deemed to be sufficient proof of service of such summons."

This sub-rule (3) gave a direction to the Court to direct service by registered post, where the defendant resided in India, whether within the jurisdiction of the Court or not and it further enjoined the Court to treat a postal acknowledgment as sufficient proof of service. However, it did not enable the Court to straight way accept the bare postal endorsement of refusal as sufficient proof of service. After the introduction of sub-rule (3) as aforesaid in this State, in *Murugayyan Kangiar* v. *Marudayyammal*[1] Rajamannar, CJ., dealt with a case where the summons sent to the defendant by registered post was returned with the endorsement of the postman 'refused'. The learned Chief Justice, after pointing out that there was no specific provision as to the procedure to be followed when a defendant refused to receive a summons sent to him by registered post, held that probably Order 5, rule 17 of the Code, was intended also to serve a case where the defendant refused to receive the summons sent by registered post and to sign the acknowledgment thereof, and the words in rule 17 'where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment' are sufficiently wide to include the case of a defendant refusing to sign the acknowledgment of receipt of a summons sent to him by registered post. Since, admittedly, there was no affixture of a copy of the summons as required by rule 17 of Order 5, it was held that there was no due service of summons in accordance with law. The decision was rendered on 5th January, 1956.

1. (1969) 2 M. L. J. 86 : 69 L. W. 563.

13. Subsequently, by Central Act LXVI of 1956, rule 20-A was introduced into Order 5. The said rule read as follows :

"20-A. (1) Where for any reason whatsoever the summons is returned unserved, the Court may, either in lieu of or in addition to the manner provided for service of summons in the forgoing rules, direct the summons to be served by registered post addressed to the defendant or his agent empowered to accept service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain.

(2) An acknowledgment purporting to be signed by the defendant or the agent or an endorsement by a postal employee that the defendant or the agent refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

This rule enabled the Court, if summons could not be properly served under the normal procedure in the first instance to order either in lieu of or in addition to the manner provided for service of summons in the preceding rules that summons be served by registered post and gave a discretion to the Court to accept either the acknowledgment or the postal endorsement of refusal as *prima facie* proof of service. That could be the only construction possible on the aforesaid rule. In *Sri Krishna Rice Mills* v. *Rajagopala*[1], Panchapakesa Ayyar, J., dealt with the case of postal endorsement of rufusal of summons taken out under rule 9 (3) incorporated in this State of Order 5 and the learned Judge found that there was no compliance with rule 17 and following the dictum of Rajamannar, CJ., in *Murugayyan Kangiar* v. *Marudayyammal*[2], held that service was not sufficient. Of course, the learned Judge did not take note of rule 20-A introduced by Central Act LXVI of 1956, but this did not alter the principle as pointed out by the subsequent pronouncement of a Division Bench of this Court, which is the one I am going to refer to now.

1. (1958) 2 M. L. J. 143 : 71 L. W. 443 : A. I. R. 1958 Mad. 522.
2. (1956) 69 L. W. 563 : (1956) 2 M. L. J. 86.

14. In *Pichai Ammal* v. *Vellayya*[1], a Division Bench of this Court consisting of Ramachandra Iyer, CJ., and Anantanarayanan, J. as he then was, was concerned with a case where the defendant refused to accept the first summons sent by registered post. The learned Judges took note of rule 20-A introduced by Central Act LXVI of of 1956 and declined to accept the stand that the said rule could be availed of in the case of a first summons sent by registered post and they were further inclined to follow the decision of Rajamannar, CJ., in *Murugayyan Kangiar* v. *Marudayyammal*[2], with regard to the failure the follow the procedure of affixing the copy of the summons as required by rule 17. The learned Judges further indicated that sub-clause (2) of rule 20-A vested a discretion in the Court to accept the refusal of postal summons as proper service or not. This decision of the Division Bench was rendered on 25th October, 1962. On 27th March, 1963, rule 9 was re-cast, so far as this State is concerned, by the amendment of this Court, in the following terms, and rule 20-A was omitted as a whole:

> "9 (1). Where the defendant resides in India, whether within or without the jurisdiction of the Court in which the suit is instituted, the Court may direct the proper officer to cause a summons under this order to be addressed to the defendant at the place, where the ordinarily resides or carries on business or works for gain, and sent to him by registered post prepaid for acknowledgment.
>
> (2) Where the summons is returned unserved or the defendant does not appear on the day fixed in the summons, the Court may direct that the summons shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant.
>
> (3) The proper officer may be an officer of a Court other than that in which the suit is instituted and where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

1. I. L. R. (1963) Mad. 672 : 76 L. W. 24 : A. I.R. 1963 Mad. 198.
2. (1956) 2 M. L. J. 86 : 69 L. W. 563.

> (4) Notwithstanding anything contained in sub-rule (1), where proceedings in Court are taken for:—
>
> (*i*) issue of an injunction, or
>
> (*ii*) punishment of a party for contempt of Court, or
>
> (*iii*) bringing to sale any property in execution of a decree or order of Court,
>
> notices shall be served only in the manner provided for in sub-clause (2)"

After the substitution in this State, clause (1) of rule 9 enabled the Court to cause summons to be served on defendant by registered post even in the first instance. Clause (2) of rule 9, however, stated that if the summons was returned unserved or the defendant did not appear on the day fixed in the summons, the Court should resort to the normal process of personal service. There was no provisions to treat the postal acknowledgment of refusal as sufficient proof of service.

15. In *K. Gounder* v. *Vannimuthu*[1], Gokulakrishnan, J., dealt with a case arising under the Act, where the Revenue Court treated the postal endorsement of refusal of notice sent through post in the first instance as proof of service and an *ex parte* order of eviction was passed. Construing the provisions of rule 9 of Order 5 of the Code, as substituted in this State, the learned Judge held that the Revenue Court ought to have followed the procedure under clause (2) of rule 9 and in the absence of such procedure having been adopted the service was defective and the *ex parte* order of eviction needed setting aside.

16. Central Act CIV of 1976 brought about very many changes into the Code. It did away with rule 20-A (which rule even earlier stood omitted so far as this State is concerned with effect from 27th March, 1963) and introduced rule 19-A. Rule 19-A reads as follows :

> "19-A. *Simultaneous issue of summons for service by post in addition to personal service.*—(1) The Court shall, in addition to, and simultaneously with, the issue of

1. (1976) 1 M. L. J. 146 : 89 L. W. 84 : A. I. R. 1976 Mad. 269.

summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain :

Provided that nothing in this sub-rule shall require the Court to issue summons for service by registered post, where, in the circumstances of the case, the Court considers it necessary.

"(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendent:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons.

Rule 17 was also slightly amended by Central Act CIV of 1976, but it did not very much alter the substance of the procedure to be adopted when the defendant refuses to accept service or cannot be found. In 1980, by amendments introduced by this Court in SRO. C-43/80, rule 9 intoduced earlier with effect from 27th March, 1963, was repealed and the word 'shall' in sub-rule (2) of rule 19-A, occurring between the words 'the Court issuing the summons' and 'declare that the summons had been...............' was substituted by the word 'may' and the proviso to sub-rule (2) was repealed. Sub-rule (2) of rule 19-A as per the Central enactment could be construed to state that it was a mandate to the Court to treat the postal endorsement of refusal as due service on the defendant. But, the amendments introduced by this Court in this State gave a discretion to the Court to treat the postal endorsement of refusal as due service on the defendant by the significant substitution of the word 'may' in the place of 'shall'. Further more, rule 9, as it stood originally enacted, has been restored for the application in this State.

17. On the date when the proceedings were initiated against the cultivating tenant by the landlords before the Revenue Court, rule 9, in its original form and rule 19-A, as amended in this State, governed the situation. In the light of these rules. can it be stated that the Court can order service of summons by registered post only and treat the postal endorsement of refusal as proof of service on the defendant ? Sub-rule (1) of rule 19-A, along with its proviso, is unambiguous and is clear in its terms when it lays down that whenever the Court deems fit to order service of summons by registered post, it shall be only in addition to, and simultaneously with the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive). No power could be spelt out for Court to order service of summons by registered post only, so long as the matter comes within the ambit of rules 9 to 19-A. The other rules, like rules 20, 25 and 30 (3), will come into play in different contingencies, about which we are not concered in the present case. As to how far the Court could accept the postal endorsement of refusal as sufficient proof of service on the defendant in those contingencies, is a question that does not require an investigation and answer in the present case. The expressions 'unless the Court otherwise directs' occurring in sub-rule (1) of rule 9 and the expressions 'order such service as it thinks fit' occurring in rule 19, will have to be viewed for the purpose of any direction or order by the Court for service by registered post only in the light of the mandate found expressed in rule 19-A. So long as the matter comes within the ambit of rules 9 to 19-A, the Court could order service of summons by registered post only in addition to, and simultaneously with the issue of summons for service on the defendant personally, as contemplated in rules 9 to 19

(both inclusive). There is no escape from this legal implication. Sub-rule (2) of rule 19-A also cannot be read as casting a mandate on the Court to accept the postal endorsement of refusal as sufficient proof of service on the defendant, because so far as this State is concerned, the expression 'shall' occurring in the last portion of the sub-rule has been deleted and significantly the expression 'may' has been substituted in its place. Hence, the discretion remains with the Court to accept the postal endorsement of refusal as proper service or not.

18. Before a Division Bench of the Kerala High Court, the impact of rule 19-A introduced by Central Act CIV of 1976. on sub-rule (3) of rule 9 came up for consideration in *Mohan Traders* v. *A. V. M. Cattle and Poultry Feed Manufacturing Industries*[1], and it has been observed as follows :

> "It follows that under the law as it stands now, service of summons through registered post is permitted only in addition to and simultaneously with the issue of summons for service in the manner provided in rules 9 to 19. An endorsement of refusal can be acted upon only if the procedure in Order 5, rule 19-A has been followed"

The Division Bench further held that sub-rule (3) of rule 9 prevailing in that State, which rule was *in pari materia* the same as the one introduced in this State on 23rd October, 1951, stood repealed by virtue of its inconsistency with the amendments introduced by Central Act CIV of 1976.

19. Apart from the explicit language of the provisions concerned, as they stand framed in this State, there is a valid and sound reason for construing the said provisions in the above manner. When the matter comes within the purview of rules 9 to 19-A, personal service as such cannot be skipped over. Service by registered post could only be in addition to and simultaneous with the process for personel service. The object of the provisions is apparently to secure the presence of the defendant. The process of personal service will necessarily have to adhere to the rules governing the same and in particular rule 17. When service by registered post is resorted to, both in addition to and simultaneous with the process for personal service, there is a discretion with the Court to accept or not to accept either the postal acknowledgment duly signed or the postal endorsement of refusal, as sufficient proof of service. The vesting of such a discretion with the Court, as stated above, has got a sound and valid reason behind it. It is not as if Courts have not come across cases of malpractices on the part of, not a very honest postman making endorsements of 'refusal' at the instance of the opposite party without even tendering the postal cover to the concerned party, and if the Court is to be left without a discretion, but to accept such an endorsement as sufficient proof or service, it will definitely lead to a miscarriage of justice. While clause (1) of rule 19-A with the proviso thereto enjoins upon the Court, if it thinks necessary to order postal service, only in addition to and simultaneous with personal service, clause (2) with the appropriate amendment in this State, has given the discretion to the Court to accept or not to accept the postal endorsement either of the acknowledgment or of refusal, as suffiicient proof of service Hence, we can take it that personal service is the normal and inescapable rule when the matter remains within the ambit of rules 9 to 19-A and service by registered post, wherever the Court thinks it necessary, can only be in addition to and simultaneous with personal service. In the present case, there has been a clear transgression of the express mandates of the relevant provisions of Order 5 of the Code and hence, the Revenue Court committed a grave error of law when it chose to proceed against the cultivating tenant *ex parte*.

20. Mr. S. Sivasubramaniam, learned counsel for the landlords, would submit that as against orders passed *ex parte* by the Revenue Court, the cultivating tenant has a remedy by way of an application to set aside the *ex parte* orders and rule 8 (*ii*) (*f*) of the

1. I. L. R. (1980) 1 Ker. 612.

Rules provides or such a remedy and the question of propriety on the part of the Revenue Court in proceeding against the cultivating tenant *ex parte* should be agitated only by resorting to such process and not in the revision against the final orders When an *ex parte* decree has been passed, the party aggrieved can either seek to have it set aside by resorting to the process provided therefor, or file an appeal as against the *ex parte* decree. Both the remedies can also be prosecuted concurrently as long as no decision is given in either of them. But, where the appellate Court gives a decision in the appeal, then the *ex parte* decree of the first Court is superseded and the process of setting aside the *ex parte* decree cannot be prosecuted. If, before the decision in the appeal is given, the *ex parte* decree is set aside, the decree appealed against ceases to exist and the appeal becomes infructuous. Where no application has been filed to set aside the *ex parte* decree and only a regular appeal has been filed, the appellate Court can go into the question of propriety of setting the defendant *ex parte* and if it finds a warrant for it, can remand the case for re-trial. The above view has been expressed by a Full Bench of this Court in *Krishna Ayyar* v. *Kuppan Ayyangar*[1]. If, however the application to set aside the *ex parte* decree has been dismissed on merits, the appellate Court is precluded from discussing the propriety of setting the defendant *ex parte*, but can decide the case on merits. This is the settled view of this Court. Reference could be made to the decision of a Division Bench of this Court in *Asethu* v. *Kesavayya*[2], where the decision of the Full Bench in *Krishna Ayyer* v. *Kuppan Ayyangar*[1], was distinguished, as well as the subsequent decision of another Division Bench of this Court in *Levai Sahie* v. *Ammenammal*[3], and the decision of a single Judge of this Court in *Lakshmi Ammal* v. *Devadas Nayudu*[4]. The above pronouncements of this Court have been adhered to by a Division Bench of the Andhra Pradesh High Court in *Munassar Bin* v. *Fatima Begum*[1]. If there had been no adjudication on merits with regard to the propriety of proceeding against the defendant *ex parte*; in the application preferred to set aside the *ex parte* decree, as in a case where such an application was dismissed for default or withdrawn and there is no finding on merits, it will be competent for the appellate Court to go into the question of propriety of proceeding against the defendant *ex parte*. The principle is, the appellate Court is clothed with the same powers as the first Court in passing appropriate orders, but if a decision has already been rendered by the first Court on merits in an application to set aside the *ex parte* decree, that will have to govern the situation and that will inhibit the appellate Court, which is seized with the regular appeal as against the *ex parte* decree, from going into the propriety of setting the defendant *ex parte*, and it is open to the defendant to canvass the order passed by the first Court in the application to set aside the *ex parte* decree in accordance with the process provided therefor. But, if there had been no application preferred for setting aside the *ex parte* decree or if such an application preferred had not been adjudicated on merits, such as in the case of a dismissal for default or withdrawal, the appellate Court can canvass the propriety of setting the defendant *ex parte*. The above principles will apply with equal force, irrespective of the fact that the remedy is one of revision instead of an appeal, when a revision alone is the remedy provided as against the final order. In the present case, Mr. M. Srinivasan, learned counsel for the cultivating tenant, has brought to my notice that applications preferred by the cultivating tenant to set aside the *ex parte* order as well as for stay had been returned by the Revenue Court, stating that the application for setting aside the *ex parte* order was time-barred and further, there was no provision to grant stay, and the cultivating tenant has not prosecuted this process further. Learned counsel produces the original papers returned by the Revenue Court and has also filed a typed set consisting of copies of the

1. (1907) I. L. R. 30 Mad. 54 : 16 M. L. J. 479 (F. B.).
2. (1920) 39 M. L. J. 697 : 12 L. W. 507 : A. I. R. 1920 Mad. 962.
3. (1923) 45 M. L J. 805 : 79 I. C. 968 : A. I. R. 1924 Mad. 107.
4. (1927) 100 I. C. 553 : A. I. R. 1927 Mad. 1114.

1. A. I. R 1975 A. P. 366.

same. This is not being disputed by the learned counsel for the landlords. This establishes that there is no prosecution of the process for setting aside the *ex parte* order and there is no adjudication on merits in any application to set aside the *ex parte* order. The rule enunciated in *Krishna Ayyar* v. *Kuppan Ayyangar*[1], would squarely apply and this Court need not be deterred from adjudicating in this revision the propriety of setting the cultivating tenant *ex parte*. When there is a blatant omission to follow the procedural imperatives by the Revenue Court, the fact that the the cultivating tenant is not inclined to follow up the other remedy need not stand in the way of this Court exercising the power of revision.

21. It is true that the matter has come past the two stages, namely, the stage of determining the arrears of rent and granting time to the cultivating tenant to deposit and the second stage of passing an order of eviction on account of the failure of the cultivating tenant to make the deposit. The first order is dated 11th June, 1982 and the second order is dated 12th July, 1982. The second order is only consequential to the first one and the legal infirmity of setting the cultivating tenant *ex parte* continued even at the second stage because, admittedly, there was no communication of the first order to the cultivating tenant and the second order also stands tainted with the same legal infirmity. But, the present revision havig been preferred only against the second order, dated 12th July, 1982, this Court can only interfere in so far as this order is concerned. Mr. M. Srinivasan, learned counsel for the cultivating tenant, submitted that his client will be content if the second order is set aside and he does not want to canvass the determination with regard to the quantum of the arrears of rent, and he further states that his client will be satisfied if the Revenue Court affords him an opportunity to make the deposit within a time to be provided therefor.

22. The discussion of law on the background of the facts of the case, compels me to interfere in revision and accordingly, this revision is allowed and the order of the Special Deputy Collector, Revenue Court, Tirunelveli, made in T. C. T. P. No. 212 of 1982 is set aside and the matter will stand remitted back to his file for him to consider the same afresh after affording an opportunity to the cultivating tenant to make the deposit of the arrears of rent determined and giving him the requisite time therefor. There will be no order as to costs in this revision.

23. After the judgment was pronounced, Mr. M. Srinivasan, learned counsel for the cultivating tenant, submits that pursuant to the order passed by the Revenue Court, the landlords have got delivery of possession recorded through the Revenue Court and he requests this Court to exercise the powers under section 6-BB of the Act. Mr. S. Sivasubramanian, learned counsel for the landlords, submits that his clients have in fact taken possession. Now that the order of eviction passed by the Revenue Court has been set aside, I find a warrant for exercising the powers under section 6-BB of the Act. While the learned counsel for the landlords would state that there are standing crops, the learned counsel for the cultivating tenant would not admit this. The landlords are directed to restore possession of the lands in question to the cultivating tenant and as a matter of caution, the landlords will have three months from to-day to restore possession of the lands in question to the cultivating tenant.

R. S. —— *Petition allowed.*

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1. 16 M. L. J. 479 : (1907) I. L. R. 30 Mad. 54(F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Maheswaran, J.*

M. R. P. Chandrasekaran
... *Appellant/Accused**

Prevention of Corruption Act (II of 1947). sections 5 (2) and (5) (1) (d) and section 461 of Indian Penal Code (XLV of 1860), Public servant receiving bribe amply proved—Want of finding under section 161 of Indian Penal Code—Would not preclude the Court from convicting the accused under section 5 (1) (d) *of Act II of 1947, if the facts make out the ingredients of that offence.*

One of the circumstances to corroborate the evidence of the complainant is giving of the report by the complainant to the anti-corruption police. The evidence of P. W. 1 as regards the demand is amply corroborated by both the evidence of P. W. 2 and by the complaint, Exhibit P-4, preferred by P. W. 1 on 30th December, 1977. The details about the phenolphthalein test by P. W. 5 and about the recovery of the incriminating currency notes and about the conduct of the appellant who got pertubed when P. W. 5 challenged him, are clearly noted in Exhibit P-6, the athakshi. P. W. 5 though a police officer, is not a partisan witness. There is nothing in the cross-examination of the police officer to discard his testimony. Apart from the evidence of P. Ws. 3, 4 and 5 which proves the recovery of incriminating currency notes from the appellant, there is the conduct of the appellant which is relevant under section 3 of the Evidence Act. When the raiding party entered the office of the appellant and revealed their identity, the appellant was very much perturbed and was disturbed, mentally. The fact is spoken to by P Ws. 1, 3 and 4 also by P. W. 5. This conduct of the appellant finds reference in Exhibit P-6, the athakshi prepared by P. W. 5 and attested by P. Ws. 3 and 4. In this case, the evidence as regards the conduct of the appellant that he was perturbed and was mentally disturbed when the identity of the police officer was revealed to him lends assurance to the evidence of P. W. 1.
[*Paras.* 7, 8 *and* 11.]

Though a charge has been framed under section 161, Indian Penal Code, the Special Judge has not discussed nor has given any finding in regard to the offence under section 161, Indian Penal Code. It must therefore be deemed that he has not convicted the appellant of that offence. Even if there is no conviction under section 161, Indian Penal Code, there is no impediment to convict the appellant under section 5 (1) (*d*) of the Prevention of Corruption Act, if the ingredients of that offence are brought home. In order to bring the charge home to the accused person under clause (*d*) of sub-section (1) of section 5, it is not necessary that the public servant in question while misconducting himself should have done so in the discharge of his duty. It is therefore clear that clause (*d*) of sub-section (1) of section 5 of the Prevention of Corruption Act is wider in scope than section 161, Indian Penal Code.
[*Para.* 12.]

Cases referred to:—

Prakash Chand v *State* (*Delhi Administration*, (1979) M. L. J. (Crl.) 419 : (1979) 3 S. C. C. 90 : (1979) 1 S C. J. 512 : (1979) S. C. C. (Crl.) 656 : 1979 Crl L. J. 329 : (1979) 2 S. C. R. 330 : A. I. R. 1979 S. C. 400 ; *Maha Singh* v. *State* (*Delhi Administration*), (1976) 3 S. C. R. 119 : (1976) Crl. L. J. 346 : (1976) 1 S. C. C. 644 : (1976) S C. C. (Crl.) 135 : A. I. R. 1976 S. C. 449 ; *State of Madras* v. *Vaidyanatha Iyer*, 1958 S. C. J. 335 : 1958 S. C. R. 580 : (1958) 1 An. W. R. (S. C.) 136 : 1958 1 M. L. J (S. C.) 136 : (1958) M. L. J. (Crl.) 299 : A. I. R. 1958 S. C. 61 ; *Daneshwar Narain Saxena* v. *Delhi Administration*, (1962) 2 An. W. R. (S C.) 164 : (1962) M. L. J. (Crl.) 645 : (1962) 2 M. L. J. (S. C.) 164 : (1962) 2 S. C. J. 538 : (1962) 3 S. C. R. 259 : A. I. R. 1962 S. C. 195 ; *Zwinglee Ariel* v. *State of M. P.* (1954) 55 Crl. L. J. 230 : A. I. R. 1954 S. C. 15 ; *Rao Shiv Bahadur Singh* v. *The State of U. P.* 1954 S. C. J. 362 : 1954 S. C. R. 1098 : A. I. R. 1954 S. C. 322

*Crl. A. No. 573 of 1979. 26*th November*, 1982.

Appeal against the judgment of the Special Judge and Chief Judicial Magistrate, Tirunelveli in Special Case No. 4 of 1978.

The accused was directed to be released on bail as per the order of this Court, dated 25th June, 1979 in Crl. M. P. No. 3489 of 1979.

T. S. Arunachalam for *D. Ravindran*, for Appellant.

T. Govindarajulu, for Public Prosecutor on behalf of State.

The Court delivered the following

JUDGMENT.—The appellant in this case has been convicted of an offence punishable under section 5 (2) of the Prevention of Corruption Act and has been sentenced to rigorous imprisonment for three months and to a fine of Rs. 100 by the learned Special Judge and Chief Judicial Magistrate, Tirunelveli. (Though a charge under section 161, Indian Penal Code is framed, the Special Judge has not discussed anything about it and has not given any finding in respect of that charge. It is a matter of regret that he has not given a finding as to whether the appellant is guilty of the offence under section 5 (1) (*d*) of the Prevention of Corruption Act also.)

2. The facts leading to the conviction of the appellant are few and may be stated. The appellant was an Assistant in the District Registrar's Office at Tenkasi. P. W. 1 Rajalingam, is the President of a society called "Soul International Society" P. W. 2 is the Vice president. P. Ws. 1 and 2 went on 26th December, 1977, to the office of the District Registrar at Tenkasi for registering the society. The appellant was an Assistant in B-1 section and P. W. 1 gave Exhibit P-2, the memorandum and Exhibit P-3 the Rules of the Society and an application Exhibit P-1, to register the society under Act XXI of 1860. The application bears an endorsement of P. W. 4, the District Registrar, directing the Joint Sub-Registrar to receive a sum Rs. 50 towards registration charges. P. Ws. 1 and 2 paid the amount and at about 12-00 noon P. W. 1 asked the appellant to hand over the receipt, whereupon the appellant told P. W. 1 that he had sent the receipt for the signature of the District Registrar and that it would take some time. But, P. W. 1 told the appellant that he has complied with all the rules and had also paid the registration charges and there was no impediment for him to give the receipt, whereupon the appellant told P. W. 1 that if he wants the receipt and the certificate of registration, he has to pay him a bribe of Rs. 50. P. W. 1 again told the appellant that as it is a society, it would not be proper to pay a sum of Rs. 50 as bribe as one cannot account for such expenditure. But, however, P. Ws. 1 and 2 were made to wait till 5-00 P. M. and then the appellant told them that the District Registrar had gone out. P, W. 1 wanted to know when he will get the receipt and the document, and certificate of registration, and he was told that he should get it when pays Rs. 50 after two days But, P. W. 1 and 2 decided to see the Vigilance Officer.

3. On 30th December, 1977, P. W. 1 gave Exhibit P-4, a complaint mentioning about the demand made by the appellant. P. W. 5, the Vigilance Inspector, asked him to go over to his office at about 1-30 P. M. and accordingly P. W. 1 went to the Vigilance Inspector and he found P. W. 3, Deputy Agricultural Officer, and another person, an assistant from the Collectorate. P. W. 1 was introduced to them. Exhibit P-4 was read over to those present there and P. W. 1 produced two currency notes of twenty-rupee denomination and one currency note of ten rupee denomination. P. W. 5 wanted to demonstrate the phenolpthalein test and for that purpose smeared phenolphthalein powder and then prepared a solution of sodium carbonate and dipped his fingers and the solution turned pink. He gave the currency notes to P. W. 1 after noting the numbers of the currency notes in Exhibit P-5, an *athakshi*. Later on at about 2-45 P. M., P. Ws. 5, and 1 and others went to Tenkasi. P. W. 1 was dropped near the Government Hospital. He was instructed to give a pre-concerted signal of scratching his head if the appellant receives the amount. Accordingly, P. W. 1 went to the office of the appellant and asked him whether the certificate of registration is ready. Thereupon, the appellant told him that the signature of the District Registrar has not yet been obtained and he asked P. W. 1 whether he has brought the money. Thereupon, P. W. 1

gave the money and the appellant received it and kept it in the drawer of the table. P. W. 1 came out and gave the agreed signal and P. Ws. 5 and 3 others entered the room. P. W. 1 was also in the room of the appellant. P. W. 5 introduced himself to the appellant and the appellant was visibly perturbed. P. W. 5 prepared a solution of sodium corbonate and dipped the fingers of the right hand of the appellant and there was no change in the solution. Later, he dipped the fingers of the left hand of the appellant and the solution turned pink. P. W. 5 asked the appellant as to whether he has received the bribe amounts. The appellant first hesitated, but then took out from the drawer of the table the amount, M. Os. 1 to 3. P. W. 5 verified the numbers of the currency notes with the numbers noted in the athakshi, Exhibit P-5, and he seized those currency notes, M. Os. 1 to 3, under an athakshi, Exhibit P-6. After obtaining sanction from P. W. 4, P. W. 5 laid the charge sheet.

4. The defence was one of denial. According to the appellant, P. W. 1 had visited him twice or thrice in connection with the registration of the society, that on the date in question he came with the memorandum of the Society, but without an application, that he asked him to have attestation of two personed on the memorandum, that P. W. 1 got the signature of a person who happened to be there, but then he asked P. W. 1 to pay the registration fee, that again when he came at 3-30 P. M he told P. W. 1 that he has sent all the papers to the District Registrar for being signed by him and asked him to wait and take the papers, but P W. 1 stated that he was being sent from pillar to post and vowed to take vengeance. He would also say that a false case has been foisted on him.

5. The Special Judge and Chief Judicial Magistrate, Tirunelveli, on the evidence adduced before him, came to the conclusion that the accused is guilty of the offence punishable under section 5 (2) of the Prevention of Corruption Act and convicted and sentenced him as stated above. The appellant challenges that judgment in this appeal.

6. P. W. 1, the President of "Soul International Society" wanted to have his society registered and for that purpose went to the District Registrar's Office at Tenkasi. The appellant, who was an Assistant in B-1 section, attended to this work and the appellant handed over Exhibit P-1, the application, P-2, the memorandum, and Exhibit P-3, the Rules and Regulations of the Society. P. W. 1 was directed to pay Rs. 50 towards registration charges which he paid. He waited for some time and then when he asked the appellant for the registration certificate and the receipt for payment of Rs. 50 was told by the appellant that if he wants them quickly, he has to pay him a sum of Rs. 50 as bribe. P. W. 1 told him that he could not pay this amount as the payment cannot be shown in the accounts of the society. P. W. 2, the Vice-President of the society, who accompanied P. W. 1 also heard about the demand made on P. W. 1 by the appellant. The evidence of P. W. 1 about the demand is very clearly corroborated by the evidence of P. W. 2. There is nothing in their evidence to show that they had any animus against him. A suggestion was thrown to P. W. 1 that the appellant asked P. W. 1 as to whether they are starting the society in order to get aid from foreign societies and to commit fraud and that on that account there was a heated discussion. But this suggestion was repelled by both P. Ws 1 and 2. The appellant has examined D. W. 1 a witness to show that there was heated discussion between P. W. 1 and the appellant. According to him, the appellant is said to have asked P. W. 1 whether they are starting the society to get money from foreigners and P. W. 1 vowed that he will see that the appellant loses his job. One cannot persuade oneself to believe that by merely asking whether they are trying to get foreign aid by starting the society, P. W. 1 the President of the Society, would say that he will see that the appellant loses his job. Furtner, D. W. 1 has stated in cross-examination that he does not know as to what transpired between the appellant and P. W. 1 The demand was on 26th. December, 1977. It is also evident that P. W. 1 has not received either the certificate of registration or the receipt for payment of Rs. 50 as they are available on record.

7. According to the prosecution, the appellant seems to have told P. W. 1 and 2 that the officer has gone out and that he has not signed the papers. But P. W. 4 the

District Registrar, has stated that he left the office only at about 6-30 P. M. In Exhibit P-4 the complaint preferred by P. W. 1 to P. W. 5 the Vigilance Officer, there is clear reference to the demand made on him by the appellant for the bribe amount of Rs. 50. In *Prakash Chand* v. *State* (*Delhi Administration*)[1], the Supreme Court took the view that one of the circumstances to corroborate the evidence of the complainant is giving of the report by the complainant to the anti-corruption police. The following observations of the Supreme Court make it clear:

> "Corroboration to the evidence of P. W. 6 if considered necessary, may be found in the following circumstances : First his evidence is corroborated by the report Exhibit P. W. 1/A which he gave to P. W. 9 that day".

8. The complaint was given on 30th December, 1977, perhaps after some deliberation. There is evidence that P. Ws. No. 1 and 2 consulted the members of the society whether to pay the amount or to approach the vigilance department. Therefore the evidence P. W. 1 as regards the demand is amply corroborated by both evidence of P. W. 2 and by the complaint, Exhibit P-4, preferred by P. W. 1 on 30th December, 1977.

9. The next important event is passing of the sum of Rs. 50 by way of bribe or illegal gratification by P. W. 1 and the receipt of the same by the appellant. On this aspect there is the clear testimony of P. W. 1 which is corroborated by the result of phenolphthalein test conducted on the appellant and the evidence of P. Ws. 3, 4 and 5. P. W. 1 gave the complaint, Exhibit P-4, to to P. W. 5 at about 12-00 noon in his office at Palayamcottai. He was asked to come back at about 1-30 P. M. by P. W. 5. At 1-30 P. M. P. W. 5 introduced P. W. 1 to P. W. 3 and another and also read over the complaint. One Arumugam. P. W. 1 then produced a sum of Rs. 50 two currency notes of twenty rupee denomination and one ten rupee curreney note. P. W. 5 then demonstrated to them the phenolphthalein test and after that smeared the phenolphthalein powder on the notes and gave them to P. W. 1. the pre-concerted signal was to scratch his head if the appellant receive the amount, while the case of P. W. 5 is that P. W. 1 should raise his hand above the head. Nothing much turns on this discrepancy in the evidence as the raiding cfficers have clearly acted upon the signal given by P. W. 1 when the appellant received the amount. P. W. 5 has noted the numbers of the currency notes given by P. W. 1 in Exhibit P-5 the athakshi The evidence of P. W. 1 shows that P. W. 5 and 3 and others accompanied by P. Ws. 1 went in a jeep, that the jeep was stopped at a place near the Government Hospital and P. W. 1 was asked to proceed. Later, P. W. 1 was followed by P. Ws. 3 and 5 and the police party. P. W. 1 saw the appellant and asked him for the receipt and the certificate of registration but the appellant asked P. W. 1 whether he has brought the amount and on being told that he had brought the amount, the appellant took the amount which P. W. 1 tendered and placed it inside the drawer of his table and then P. W. 1 came out and gave the signal and the raiding party entered the room of the appellant and P. W. 5 conducted the phenolphthalein test. He immersed the fingers of the right hand of the appellant inside the solution of sodium corbonate. As nothing happened to the solution, the fingers of the left hand of the appellant, were immersed in the solution of sodium corbonate, prepared separately and the solution turned pink. P. W. 1 further says that when P. W. 5 revealed his identity the appellant got perturbed and when questioned whether he received the bribe amount, he did not answer first and then took out the amount from the drawer of the table and gave it to P. W. 5 who compared the numbers of the currency notes noted in Exhibit P-5, the athkashi earlier prepared and P. W. 5 found them to accord with those numbers. P. W. 5 then prepared Exhibit P-6, an athkashi incorporating in it, all that had happened in the office of the appellant. The evidence of P. W. 1 about the raid by the police party of the office of the appellant with P. W. 3 and others, is corroborated, by the

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1. (1979) M. L. J (Crl.) 419 : (1979) 3 S C C. 90 : (1979) 1 S. C. J. 512 : (1979) S. C. C. (Crl.) 656 : (1979) Crl. L. J. 329 : (1979) 2 S C R. 330: A. I. R. 1979 S. C. 400.

evidence of P. W. 3 himself and the evidence of P. W. 4., the District Registrar, who was in that office at that time and by P. W. 5 the investigating officer. P. W. 3 Deputy Agricultural Officer, speaks about the signal given by P. W. 1 after the receipt of the money by the appellant and their entering the room of the appellant and P. W. 5 conducting the phenolphthalein test and then questioning the appellant about the receipt of the money and the appellant producing the money from out of the drawer of the table and P. W. 5 comparing the notes with the numbers of the currency notes noted in Exhibit P-5 and then preparing Exhibit P-6, the athakshi and his attesting Exhibit P-6. P. W 4 was informed about the raid by the peon of his office and he went to the place where the appellant was and he also witnessed the phenolphthalein test conducted by P. W. 5. He corroborated the evidence P. W. 3. He also speaks about the appellant producing the money from the drawer of his table. He has also attested Exhibit P-6, the *athakshi*. P. W. 5, investigating officer, has also spoken about the raid. His evidence is corroborated in all material particulars by the evidence of of P. Ws. 1, 3 and 4. The numbers of the currency notes produced by the appellant accorded with the numbers noted in Exhibit P-5, the athakshi. The evidence adduced by the prosecution therefore clearly establishes that P. W. 1 has paid Rs. 50 the bribe amount, and it was received by the appellant and kept in the drawers of his table and that the phenolphthalein test proved positive when the fingers of the left hand of the appellant were dipped in the solution of sodium corbonate prepared by P. W. 5 and that the appellant produced the money from the drawer of the table.

10. It is now contended for the appellant by the learned counsel that the evidence of the prosecution witnesses is interested and discrepant in material particulars, that the trial Court failed to note that the evidence relating to the trap is highly artificial and the seizure of notes cannot be believed and that the story of the prosecution that the accused took the money by the left hand and put it in the right side drawer is highly artificial

(See grounds Nos. 3, 4 and 5 in the memorandum of grounds of appeal).

11. As regards the first ground, the defence has not shown as to what those discrepancies which have materially affected the evidence of the prosecution witnesses are. On the second ground, it must be pointed out that there is also no reason why the seizure of currency notes should not be believed. P. W. 3 and P. W. 4, the District Registrar in whose office the appellant works, have clearly spoken to the fact of the appellant producing the currency notes from the drawer of the table. The evidence of P. W. 5 also lends assurance to that fact. There is no reason why these witnesses should be disbelieved A faint attempt was made by the defence to show that the amount was planted without the knowledge of the appellant The Special Judge has clearly pointed out that it is highly improbable that a stranger would enter the office of the appellant and in his absence plant the currency notes inside the drawer of the table. The defence story therefore is highly unbelievable in the appellant receiving the amount with the left hand and placing it inside the right side drawer of the table. It is not improbable that the appellant would have received the amount with his left hand and as he was holding the amount in his left hand, would have opened the drawer with his right hand and placed the currency notes inside the right side drawer. It is only a matter of convenience. It is not necessary that if the appellant receives the amount with the left hand, he should place it only in the left side drawer There was clinching proof that the currency notes, the numbers of which have already been noted in Exhibit P-5, have been recovered from the right side drawer of his table immediately after its receipt from P. W. 1, the complainant. The evidence is that the appellant himself produced these currency notes the numbers of which accorded with the numbers noted in Exhibit P-5. This is clearly spoken to by P. W. 3 and is corroborated by P. W. 4 and 5. The phenolphthale in .test conducted on the appellant proved positive when the fingers of the left hand of the appellant were immersed in the solution of sodium corbonate and this lends assurance to the evidence that the appellant received the amount which he gave. The counsel for the appellant sought to rely on the evidence of P. W. 4 to explain the reason for the solution turning pink. P. W. 4 has admitted in cross-examination that one of the Inspectors was catching hold of the hand of the appellant. But P. W. 5 has emphatically denied this. He has

also stated that no Police Officer held the land of the appellant. It may not be fair to suggest that the police officer would have deliberately smeared the hand of the appellant with phenolphthalein powder though he may be interested in the success of the trap. The recovery was witnessed by P. W. 3, an independent witness, and also by P. W. 4, the District Registrar himself A random suggestion was thrown to P. Ws. 3 and 4 that there are lots of complaints about them to the vigilance officers. But that suggestion was repelled by both the witnesses. The evidence of P. Ws. 3 and 4 is creditworthy and reliable If the appellant had not received the amount and if it had been planted without his acquiescence or knowledge, he would not have been in a position to produce it from the drawer of his table, for he would not know where those incriminating currency notes whose numbers have been noted already in Exhibit P-5. The story of the defence that the notes were planted without the knowledge of the appellant has to be disbelieved. The details about the phenolphthalein test by P. W. 5 and about the recovery of the incriminating currency notes and about the conduct of the appellant who got perturbed when P. W. 5 challenged him, are clearly noted in Exhibit P-6, the athakshi. P. W. 5 though a police officer, is not a partisan witness. There is nothing in the cross-examination of the police officer to discard his testimony. In *Maha Singh* v. *State (Delhi Administration.)*[1], the Supreme Court observed:

> "P. W. 7, the Inspector, cannot be considered as an absolutely partisan witness because he is a police officer who took immediate action on the complaint. Nothing unusual is suggested against him."

Apart from the evidence of P. Ws. No. 3, 4 and 5 which proves the recovery of incriminating currency notes from the appellant, there is the conduct of the appellant which is relevant under section 8 of the Evidence Act. When the raiding party entered the office of the appellant and revealed their identity, the appellant was very much perturbed and was disturbed mentally. That fact is spoken to by P. Ws 1, 3 and 4 and also by P. W. 5. This conduct of the appellant finds reference in Exhibit P-6, the athakshi prepared by P. W. 5 and attested by P. Ws. 3 and 4. In *Zwinglee Ariel* v. *State of Madhya Pradesh*[1], the Supreme Court held that the evidence to the effect that the accused started trembling and showed signs of being frightened on being questioned by the police officer, if proved, was admissible. In *Rao Shiv Bahadur Singh & another* v. *The State of Vindhya Pradesh*[2], the Supreme Court relied upon the evidence relating to the conduct, namely that the accused was confused and could furnish no explanation when questioned by the police officer. In *State of Madras* v. *Vaidyanatha Iyer*[3], the evidence which is to the effect that the accused was seen trembling and he silently produced the currency notes from the folds of his dhoti, was relied on and acted upon. In this case, the evidence as regards the conduct of the appellant that he was perturbed and was mentally disturbed when the identity of the police officer was revealed to him lends assurance to the evidence of P. W. 1 that the appellant has received the tainted money from P. W. 1. On a consideration of the entire evidence, I am satisfied that the appellant was rightly convicted.

12. It is then pointed out that the special Judge has not convicted the appellant under section 161, Indian Penal Code. It is rather unfortunate that though a charge has been framed under section 161, Indian Penal Code, the Special Judge has not discussed nor has given any finding in regard to the offence under section 161, Indian Penal Code.

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1. (1976) 3 S. C. R. 119 : 1976 Crl. L. J. 346 : (1976) 1 S. C. C. 644 : (1976) S. C. C. (Crl.) 135 : A. I. R. 1977 S. C. 449.

1. (1954) 55 Crl. L. J. 230 : A. I. R 1954 S. C. 15.
2. 1954 S. C. R 1098 : 1954 S. C. J. 362 : A. I. R. 1954 S. C. 322.
3. 1958 S. C. J. 335 : 1958 S. C. R 580 : (1958) 1 An. W. R (S. C.) 136 : (1958) 1 M. L. J. (S. C.) 136 : (1958) M. L. J. (Crl) 299 : A. I. R. 1958 S. C. 61.

It must therefore be deemed that he has not convicted the appellant of that offence. Even if there is no conviction under section 161, Indian Penal Code, there is no impediment to convict the appellant under section 5 (1) (*d*) of the Prevention of Corruption Act, if the ingredients of that offence are brought home. In *Dhaneshwar Narain Saxena* v. *Delhi Administration*[1], the Supreme Court took the view that the neceseary ingredient of an offence under section 161, Indian Penal Code, is the clause "as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or dis-service to any person, with the Central or any State Government or Parliament or the Legislature of any State, or with any public servant" but it need not be there in order to bring an offence under section 5 of the Act home to the accused and that the words "in the discharge of the duty" occurring in section 5 do not constitute an essential ingredient of the offenee and that the ingredients of the offence under clause (*d*) of sub-section (1) of section 5 are : (1) that the accused should be a public servant ; (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; and (3) that he should have thereby obtained a valuable thing or pecuniary advantage for himself or for any other person, and in order to bring the charge home to the accused person under clause (*d*) of sub-section (1) of section 5, it is not necessary that the public servant in question while misconducting himself should have done so in the discharge of his duty. It is therefore clear that clause (*d*) of sub-section (1) of section 5 of the Prevention of Corruption Act is wider in scope than section 161, Indian Penal Code.

13. The conviction and sentence are confirmed and the appeal is dismissed.

R. S. R. —— *Appeal dismissed.*

1. (1962) 2 M. L. J. (S. C.) 164 : (1962) 2 An. W. R. (S. C.) 164 : (1962) M. L. J. (Crl.) 645 : (1962) 2 S. C. J. 538 : (1962) 3 S. C. R. 259 : A I. R. 1962 S. C. 195.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and G. Maheswaran, JJ.*

Sundarambal Achi ... *Petitioner**

v.

The Appellate Authority and Sub-Collector, Kumbakonam and another ... *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), sections 3 (d) (vi) Explanation *and (*vii), *4, 5 —Applicability—Promissory note—Creditor obtaining decree thereon—Debtor applying to Tahsildar for certificate of discharge—Refusal of such certificate—Tahsildar's certificate showing only approximate value of the property owned by the debtor—Appellate authority holding debtor entitled to the benefits of the Act and Tahsildar's certificate unacceptable due to his not being the competent authority—Creditor filing writ.*

The creditor obtained a decree in respect of a promissary note debt. After the coming into force of the Tamil Nadu Debt Relief Act (XIII of 1980) the debtor filed an application before the Special Tahsildar (Debt Relief) for a certificate of discharge of the said loan on the ground that he was entitled to the benefits of the Act. The Special Tahsildar refused such certificate on the ground that he was not a debtor as defined in the Act as he was holding immovable property other than cultivable lands of the value of Rs. 38,000. On appeal by the debtor, the appellate authority held that he was entitled to the benefit of the Act as he had not been shown to possess immovable property worth more than Rs. 25,000 and that the certificate given by the Tahsildar cannot be accepted on the ground that he was not the competent authority and even otherwise the certificate gave only appropriate value and not the actual market value. The creditor filed a writ petition to quash the order of the appellate authority.

Held: The appellate authority has overlooked the Government Order MS. No. 2614, Revenue, dated 24th November, 1980, under

*W. P. No. 8087 of 1981. *1st February,* 1982.

which the Tahsildars or Deputy Tahsildars have been appointed as "prescribed authority" for determining the value of the properties under the *Explanation* to section 3 (*d*) (*vi*) and (*vii*) of the Tamil Nadu Debt Relief Act (XIII of 1980). The appellate authority therefore is not right in stating that the Tahsildar was not the competent authority to give the certificate of valuation. [*Para.* 2.]

It is no doubt true that the Tahsildar, has stated that immovable property of the debtor is worth about Rs. 38,000. Even though the Tahsildar has stated that the market value of the property would be about Rs. 38,000 even taking it as approximate value it is far above Rs. 25,000. Therefore the appellate authority should have accepted the certificate given by the Tahsildar showing the worth of the immovable property owned by the debtor as more than Rs. 25,000 and held that he is not entitled to the benefits of the Act. [*Para.* 3.]

The debt in respect of which the benefit under the Act was claimed is a promissory note debt and in respect of such debts neither section 5 nor section 6 of the Act applies and only section 4 will stand attracted. Under section 4 the Tahsildar is not empowered to give a certificate of discharge and it is only in the civil Court wherein money claim is sought to be enforced by the creditor, the debtor can put forward his defence that he is entitled to benefits of the Act. It has been held in a series of cases that in respect of a mere money claim by the creditors the Tahsildar is not empowered to give a certificate of discharge and in those cases the question whether the debtor is entitled to the benefit of the Act has to be agitated before and adjudicated upon by the civil Court in which the money claim is sought to be enforced by the creditor. In this case, the petitioner is said to have filed a suit and obtined a decree. If that is the factual position, then it is only at the stage of execution the debtor can file an application claiming the befiefits of the Act and in that event, the civil Court will have to go into the question as to whether the debtor is entitled to the benefits of the Act and give relief if he is so entitled. Even if the suit is pending the debtor can seek an adjudication on the question as to whether he is entitled to the benefits of the provisions of the Act and if he provesentitlement, the civil Court will have to give relief as provided in the Act. [*Para.* 4.]

Petition under Article 226 of the Constitution of India for issue of writ of *certiorari* calling for records of first respondent in D. R. Ap 26 of 1981, dated 29th June, 1981, and quash the same etc.

V. Santhanam, for Petitioner.

Jagadeesan for Government Pleader and *K. Prabhakaran*, for Respondents.

The Order of the court was made by

Ramanujam, J.,—The petitioner herein is a creditor and the second respondent herein is a debtor who has borrowed a sum of Rs. 1,200 from the former on a pronote. After the coming into force of the Tamil Nadu Debt Relief Act (XIII of 1980) the second respondent filed an application before the Special Tahsildar (Debt Relief), Kumbakonam, for a certificate of discharge of the said loan on the ground that he is entitled to the benefits of that Act. The Special Tahsildar passed an order, dated 28th February, 1981, refusing to grant a certificate of discharge on the ground that the second respondent was not a debtor as defined in the Act as he was holding immovable property other than cultivable lands to the value of Rs. 38,000. On appeal by the debtor, the second respondent herein, the appellate authority held that the second respondent is entitled to the benefits of that Act as he has not been shown to possess immovable property worth more than Rs. 25,000 and that the certificate given by the Tahsildar. Thiruvidaimarudur, stating that the debtor owns properties worth about Rs. 38,000 cannot be accepted on the ground that he is not the competent authority and that even otherwise the certificate gives only an approximate value and not the actual market value.

2. In this writ petition, the petitioner questions the validity of the order of the first respondent, the appellate authority on the ground that the certificate given by the Tahsildar, Thiruvidaimarudur, should have been accepted as he is a competent authority prescribed for the purpose in

G.O. Ms. No. 2614, Revenue, dated 24th November, 1980. The reason why the first respondent has ignored the certificate given by the Tahsildar, Thiruvidaimarudur is that he is not a competent authority to give the certificate as to the market value of the properties. However, the appellate authority has overlooked the Government Order Ms. No. 2614, Revenue, dated 24th November, 1980, under which the Tahsildars or Deputy Tahsildars have been appointed as prescribed authority for determining the value of the properties under the *Explanation* to section 3 (*d*) (*vi*) and (*vii*). The appellate authority therefore, is not right in stating that the Tahsildar, Thiruvidaimarudur, was not the competent authority to give the certificate of valuation.

3. The next ground is that the certificate given by the Tahsildar, Thiruvidaimarudur, gives only an approximate value and not the actual market value. It is no doubt true that the Tahsildar, Thiruvidaimarudur, has stated that immovable property of the debtor is worth about Rs. 38,000. Even though the Tahsildar has stated that the market value of the property would be about Rs. 38,000 even taking it as an approximate value, it is definitely far above Rs. 25,000. Therefore, the appellate authority should have accepted the certificate given by the Tahsildar, Thiruvidaimarudur, Showing the worth of the immovable property owned by the debtor as more than Rs. 25,000, and held that he is not entitled to the benefits of the Act.

4. Though on this ground the order of the appellate authority has to be set aside, we have to set aside both the orders of the initial authority and the appellate authority as they have no jurisdiction to pass the orders in question. As already stated, the debt in respect of which the debtor claims benefits under the Act is a promissory note debt and in respect of such debts neither section 5 nor section 6 of the Act applies and only section 4 will stand attracted. Under section 4, the Tahsildar is not empowered to give a certificate of discharge and it is only in a civil Court wherein the money claim is sought to be enforced by the creditor, the debtor can put forward his defence that he is entitled to the benefit of the Act and the civil Court will have to naturally consider the question as to whether the debtor is entitled to the benefits of the Act. We have held in a series of cases that in respect of mere money claims by the creditors the Tahsildar is not empowered to give a certificate of discharge and in those cases the question whether the debtor is entitled to the benefits of the Act has to be agitated before and adjudicated upon by the civil Court in which the money claim is sought to be enforced by the creditor. In this case, the petitioner is said to have filed a suit and obtained a decree. If that is the factual position, then it is only at the stage of execution the debtor can file and application claiming the benefits of the Act an in that event, the civil Court will have to go into the question as to whether the debtor is entitled to the benefits of the Act and give relief if he is so entitled. Even if the suit is pending the debtor can seek an adjudication on the question as to whether he is entitled to the benefits of the provisions of the Act and if he proves entitlement, the civil Court will have to give relief as provided in the Act.

5. Subject to the observations made above, the order of the first respondent is set aside and the writ petition is allowed. There will be no order as costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

M/s. K. M. Venkataraman Chettiar & Sons, by its Managing Partner, K. V. Nagasubramaniam ... *Appellant**

v.

N. G. Kutram Kasthuri Rangiah Chettiar Charity Estate, Trichy, represented by its Trustee, T. R. Karunakaran and others ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 29—Exemption of certain buildings from purview of Act by G. O. Ms. No. 1998, dated 12th August, 1974 and G. O. Ms. No 2000, dated 16th August, 1976—Supersession of the earlier G. O. by the later G. O.—Suit for possession by Public Trust—Maintainable—Earlier G. O. Applicability of to both classes of trusts.

In the instant case the charity was to feed the members of the Chettiar Community on the day when the deity in a temple was taken out in possession on horse vahanam. The trust in question was found to be a public trust and hence entitled to the benefits of exemption from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act by virtue of G. O. Ms. 2000, Home, dated 16th August, 1976. The suit is therefore maintainable.

The earlier notification, would apply to both private and public trusts and not to public trusts alone or else, there was no reason for the Government to modify the orders in G. O. Ms. No. 1998, Home, dated 12th August, 1974 so as to exclude private trusts from the exemption granted and to limit its application to public charitable trusts only, as seen from the notification. The very fact that the words "Hindu, Christian and Muslim religious trusts and charitable institutions" occurring in the earlier notification is replaced by the word "Hindu, Christian and Muslim religious public trusts and public charitable trusts" and the fact that the earlier notification is superseded by the later notification are clear indications that the earlier notification exempted both public and private religious trusts. There is no doubt that G. O. Ms. No. 2000, Home, dated 16th August, 1976, exempts all buildings owned by Hindu, Christian, and Muslim religious public trusts and public charitable trusts from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

[*Para.* 9.]

Cases referred to:—

The Bihar State Board of Religious Trust (Patna) v. *Mahanth Sri Viseshwar Das*, (1971) 3 S. C. R. 680 : A. I. R. 1971 S. C. 2057 ; *The Trustees of Gordhandas Govindas Family Trust* v *The Commissioner of Income-tax, Bombay*, (1973) 2 I. T. J. 441 : (1973) 2 S. C. J 533 : 88 I. T. R. 47 : (1973) Tax. L. R. 1936 : (1973) 3 S. C. C. 346 : (1973) M. P. L. J. 752 : A. I. R. 1973 S. C. 623 ; *S. A. Appal Raja* v. *The Common Fund of Segunatha Mudaliar Community of Poopalarajopetti Rajapalayam, through its President S. A. Thangavel*, (1982) 1 M. L. J. 318 : (1958) 2 R. C. J. 505 : 95 L W. 156 ; *G. Radhakrishna Chettiar* v. *The Commissioner of Hindu Religious and Charitable Endowments, Madras*, (1960) M. W. N. 198 : (1960) 1 M. L. J. 494; *Sri Venkataram Dayaru* v. *State of Mysore* (1958) 1 M. L J. 106 (S. C.) 1958 S. C. J. 382 : 1958 S. C. R. 895 : (1958) 1 An W. R. (S. C.) 109 : A. I. R. 1958 S. C. 255 ; *Ahmedabad Rana Caste Association* v. *Commissioner of Income-tax* (1972) 1 S. C. R. 744 : (972) 1 S C. J. 458 : (1972) 1 I. T. J. 306 : 1972 Tax. L. R. 78 : A. I. R 1972 S. C. 273 : 82 I. T. R. 704.

Appeal against the decree of the District Court, Tiruchirapalli, dated 15th April, 1978, in Appeal Suit No. 389 of 1977, preferred against the decree of the Court of the District Munsif of Tiruchirapalli in Original Suit No. 1238 of 1975.

K. Sarvabhauman, for Appellant

V. Srinivasan, for Respondents.

The court made the following

ORDER:—The defendant against whom an orer of eviction has been passed is the appellant in this Second Appeal.

*S. A. No. 1510 of 1978 *26th November* 1978.

2. The suit property, a building, of which the appellant was a tenant, belonged to the Plaintiff-trust. A petition for eviction was filed in H. R. C. O. P. No. 328 of 1973 on the file of the Rent Controller by the Plaintiff-trust against the appellant on the ground that he is in arrears of rent and has also sublet a portion of the building. An order for eviction was passed. When the appeal was pending G. O. Ms. No. 1998, dated 12th August, 1974 was passed exempting all buildings belonging to religious endowments from the operation of the Tamil Nadu Buildings (Lease and Rent Control) Act. The apppeal was therefore dismissed and later the respondent filed the suit after giving a valid notice to the defendant.

3. The suit was resisted by the defendant, who *inter alia* contended that the first plaintiff is not the trustee of the plaintiff-trust, that the plaintiff-trust is neither a religious trust nor a chairtable institution, and that G. O. Ms. No. 1998, dated 20th August, 1974, will not apply. The trial Court has observed that the plaintiff has admitted that it is a private trust and that the G. O. does not make a distinction between public and private trusts and therefore the plaintiff is entitled to claim exemption from the provisions of the Rent Control Act and in the end decreed the suit. In appeal, the District Judge, without discussing the question at issue, concurred with the finding of the trial Court and dismissed the appeal. The appellant challenges that judgment and decree in this second appeal.

4. At the time of admission of the Second Appeal, the High Court formulated the following substantial question of law:

> "Is the suit maintainable in a civil Court for eviction and whether G. O. Ms. No. 2,000, dated 16th August, 1976 is applicable to only public trusts and not to private trusts as that of plaintiff".

What is contended before me is that G. O. Ms. No. 1998, Home' dated 12th August, 1974 was superseded by G. O. Ms. No. 2000, Home, dated 16th August, 1976 and that the latter G. O. exempts all buildings owned by the Hindu, Christian and Muslim *public trust* and *public charities* from the provisions of the Tamil Nadu Building (Lease and Rent Control) Act and there being an admission by P. W. 1 that this is a private trust the civil Court will not have jurisdiction to entertain the suit. As far as I could see, there appears to be no such admission by P. W. 1 that it is a private trust. The appellant Judge has not given any finding as to whether the property is a public trust or a private trust. As there is no clinching finding as to whether the plaintiff-trust is a public trust or a private trust, a finding has to be called for and the lower appellate Court will give a finding as to whether the plaintiff-trust is a public trust or a private trust. The finding will be given within two months from the date of receipt of records.

5. Pursuant to the aforesaid order of this Court, dated 9th March, 1982, the District Judge, Tiruchirapalli submitted the following findings :

1. This appeal having been heard on 2nd June, 1982, upon perusing the grounds of appeal, the decree and judgment of the lower Court and the material papers in the case and upon hearing the arguments of Thiru R. Madhava Rao, Advocate for appellant and for Thiru S. Muthuvenkataseshan, Advocate for respondents and having stood over for consideration till this day, the Court made the following *findings* ;

Findings submitted as per the direction made in S. A. No. 1510 of 1978, dated 9th March, 1982, by the High Court, Madras.

2. A. S. No. 389 of 1977 is the appeal filed by the defendant against the decree for eviction psssed by the learned District Munsif, Tiruchirapalli. One of my learned predecessors dismissed the said appeal with costs. The defendant preferred a second appeal in the High Court in S. A. 1510 of 1978. The High Court has been pleased to call for a finding from this Court as to whether the plaintiff trust (Ist respondent) is a public trust or a private trust.

3. After the records were received from the High Court notices were given to the counsels for the appellant and the respondents. The counsels entered appearance and made an endorsement that they are not letting in any additional oral or documentary evidence. The counsels contented

themselves with advancing arguments on their respective side.

4. The only point for determination in the light of the direction given by the High Court is "whether the 1st respondent, trust is a public trust or a private trust ?

5. *The Point*: The appellant is a tenant in the suit property, which admittedly belongs to the 1st respondent trust. A petition for eviction was filed in H. R. C. O. P. No. 328 of 1973 on the file of the Rent Controller by the respondent trust against the appellant on the grounds of arrears of rent and sub-letting. Against the order of eviction passed by the Rent Controller, an appeal was filed by the tenant. When the appeal was pending. G. O. Ms. No. 1998, Home Department, dated 12th August, 1974, was passed exempting all the buildings owned by the Hindu, Christian and Muslim religious trusts and charitable institutions from all the provisions of the Rent Control Act. The appeal was dismissed with the observation that the eviction order was inexecutable. Thereupon the trust filed a suit for eviction after giving valid notice to quit to the appellant. In the said suit, the trial Conrt had held that the trust was entitled to claim exemption from the provisions of the Rent Control Act and decreed the suit. In the appeal one of my predecessors confirmed the trial Court's finding and dismissed the appeal. In the above circumstances, the tenant preferred the second appeal in the High Court. The Ist respondent is one N. G. V. Kasthuri Rengiah Chettiar Charity Estate, Tiruchi by its Trustees T. R. Karunakaran. The 2nd respondent having died pending the second appeal, one V. Perumal was impleaded as the 3rd respondent trustee in the place of the deceased 2nd respondent. For determination of the question whether the 1st respondent is a public trust or a private trust, it is necessary to examine the two Government orders which provide for exemptions from the operation of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act to certain buildings. The first Government Order is G. O. Ms. No. 1998, Home Department, dated 12th August, 1974, and the same is in these terms; In exercise of the powers conferred by section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 (Tamil Nadu Act XVIII of 1960) the Governor of Tamil Nadu hereby exempts all the previsions of the said Act. In the above notification, evidently no distinction was made between public trust and private trust and whether the trust belonged to one or other of three religious denominations *viz.*, Hindu, Muslim and Chtistian. The appellant's contention was that the aforesaid Government Order would not apply to the Ist Respondent, The argument advanced on behalf of the appellant was that the respondent, trust was neither a religious trust nor a charitable institution and hence the G. O. Ms. No. 1998, dated 12th August, 1974 would not apply But then the question of applicability or otherwise of the above Government Order, to the respondent trust has becom purely academic in view of the supersession of the same by a later Government Order passed in 1976. G. O. Ms. No. 2000, Home Department, dated 16th August, 1976 provides as follows:-

The Government in G. Ms. No. 1990, Home, dated 12th August, 1974 issued a notification exempting all the buildings owned by the Hindu, Christian and Muslim religious trusts and Charitable institutions from all the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act. The Government have now decided to modify the orders in G. O. Ms. No. 1998, Home, dated 12th August, 1974 so as to exclude private trusts from the exemption granted and to limit its application to public charitable trusts only. Notification reads as follows :—

In exercise of the powers conferred by section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil Nadu Act XVIII of 1960) and in supersession of the Home, Department, Notification No. II (2)/HO/3811/974, dated 12th August, 1974 published at page 444 of Part II section II of the Tamil Nadu Government Gazette, dated the 21st August, 1974, the Governor of Tamil Nadu hereby exempts all the buildings owned by the Hindu, Christian and Muslim religious public trusts and public charitable trusts from all the provisions of the said Act. The principal feature of the above Government Notification is that the buildings owned by Hindu, Christian and Muslim religious

public trust and public charitable trust are exempted from the provisions of the Rent Control Act. The question to be decided is whether the respondent trust is a Hindu religious public trust or a private trust. My discussion, in view of the direction by the High Court would have to be confined to the point as to whether the 1st respondent is a dublic trust or a private trust. The High Court has been pleased to observe in its judgment that there is no admission by P. W 1 that it was a private trust. On going through the oral evidence of P. W. 1 who is one of the trustees, I do not find any admission to the effect that the trust is a private trust. While referring to the purpose of the trust, the witness has stated that on the day when Samayapuram deity is taken out on "*Horse vaganam*" feeding used to take place. The appellant was the sole witness on his side. He has admitted that P. W. 1 was the eldest son of his father and that the witness used to tender rent to P. W. 1's father. D. W 1 has absolutely no personal knowledge as to whether the purposes of the trust are being carried out or not He has stated that he had visited the "Chathiram" (சத்திரம்) in Samayapuram on the date of car Festival and had taken food. It is common ground that the parties herein belong to the same community. From the evidence, it is clear that the persons belonging to Chettiar Community used to be fed on specified days during the festival in Samayapuram in accordance with the stipulation of the trust. No effective contest has been put forward on behalf of the tenant questioning the fact that the 1st respondent was a trust.

6. The learned counsel for the appellant submitted three authorities in support of his case that the 1st respondent cannot be regarded as a trust in the true sense of the term. *The Bihar State Board of Religious Trust (Patna)* v. *Mahanth Sri Viseshwara Das*[1], was the first decision cited by him. It was held "that feeding of Sadhus and giving hospitality to way-farers is not by itself indicative of temple being subject to a public trust". It was further held that "unless the asthal (Religious Mutt) itself is a public trust for religious or charitable purpose, properties appertaining thereto would not be properties of public trust for religious or charitable purposes. So far as this case is concerned, the rental income from the property is said to be used for providing food to the worshippers of the community at Samayapuram on specified days. There appears to be no restriction to the effect that only family members of the 1st respondent would be fed on a particular date in Samayapuram. The very fact that the appellant himself has taken food (it is nowhere contended that the appellant is one of the members of the family of the 1st respondent) highly probablises the public character of the trust. So no assistance can be derived from the abovesaid decision submitted by the learned counsel for the appellant. The next decision cited is *The Trustees of Gordhandas Govindaram Family Trust, Bambay* v. *The Commissioner of Income-tax Bombay*[1]. It was held in that case 'where the trust is created primarily for the benefit of the members of the settlor's family it is a private trust and it cannot be said that the Trust in question is a trust for any public purpose". The above decision would not *per se* be applicable to the case on hand. The next decision cited by the learned counsel for the appellant is *S. A., Appal Raja* v. *The Common Fund of Senguntha Mudaliar Community of Poopajrjapetti Rajapalayam through its President S. A. Thangavel*[2]. In the above case their Lordships have held "the religious trusts" referred to in the said notification denote only public religious trusts, since they are preceded by the words "Hindu", "Christian" and "Muslim". If the intention were to refer to private trust, the reference to the three great religious denominations would have been quite unnecessary. Likewise the expression "Charitable institutions" can refer only to public charitable institutions. Charity, *per se*, has a well defined meaning in many advanced legal systems, including our own. Charity is not alms-giving, or private charity. It refers to advancement of any object of public utility or benefit, such as education, public health, poor relief and the like .. ..Subsequent notification of 16th August, 1976 did not make for a departure

1. (1971) 3 S.C.R 680 : A. I.R. 1971 S. C. 2057

1. (1973) ? I. T. J 441 : (1973) 2 S. C. J. 533 : 88 I. T. R 347. (1973) Tax. L. R. 1936 : (1973) 3 S. C. C. 346 : (1973) M. P. L. J. 762 : A. I. R. 1973 S C. 623.

2. (1982) 1 M. L. J. 318 : (1982) 2 R. C. J. 505 : 95 L. W. 156.

in the Government's exemption policy, but only made explicit what was implicit in the earlier notification". The above decision is the authority for the position that, second notification would apply as well as its predecessor to public trust only and not to private trust.

7. The learned counsel for the respondent contended that public charitable purpose being the dominant object of the trust, the 1st respondent should be regarded only as a public trust, which would entitle itself to claim the benefit of the exemption from the provisions of the Rent Control Act. In this connection, he referred to sections 6 (5), 6 (18), 6 (19), 6 (16) and 6 (17) of the Madras Hindu Religious and Charitable Endowments Act (1959), in support of his contention that the 1st respondent trust is a Hindu religious charitable institution. Religious charity according to sub-section 16 means a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with a math or temple or not. On a scrutiny of the sub-sections of section 6 of the Act, I am inclined to agree with the learned counsel for the respondent that the 1st respondent is a public charitable trust or institution. The next decision cited by the 1st respondent is *G. Radhakrishna Chettiar and others* v. *The Commissioner, Hindu Religious and Charitable Endowments, Madras*[1]. In that case the charitable institution was intended to feed Arya Vysya pilgrims to religious festivals upon the stated occasions. It was held that the endowment would be a 'religious charity' even apart from the performance of puja and nevedyam. The Arya Vysyas of the region would constitute the "Public" within the scope of that term. Having regard to the purpose of the trust, and the decisions bearing on the point in issue, I am satisfied that the 1st respondent trust is a Hindu religious public charitable trust and that G. O. Ms. No. 2000, Home, dated 16th August, 1976, is applicable to the said trust. The legal conqseuences that would flow from the said finding is that the suit filed by the trust for eviction will be maintainable in a civil Court. The point is accordingly found.

1. (1960) M. L. J. 494 : (1960) M. W. N. 198.

7. In the result, I submit the following finding to the High Court, "The 1st respondent trust is a public trust".

On receipt of the finding the Court delivered the following

JUDGMENT :—The learned District Judge has rendered a finding that the plaintiff-trust is a public trust. If it is held to be a public trust, the suit for eviction of the defendant-appellant would be maintainable. The counsel for the appellant invited my attention to the objections filed by him and contended that P. W. 1 has clearly admitted that the plaintiff-trust is only a private trust and that the finding of the District Judge is contrary to the evidence and is unsustainable in law. Even in my order calling for a finding I have clearly stated that there appears to be no such admission by P. W. 1 that the trust is a private trust. Even the District Judge has observed that on going through the oral evidence of P. W. 1, who is one of the trustees, he does not find any admission that the trust is a private trust. While so, it is rather strange that the appellant says that P. W. 1 has admitted that the trust is a private trust. From Exhibit A-4 and from the evidence of P. W. 1 it is clear that a charity is conducted. P. W. 1's evidence would show that at Samayapuram temple on the day when the deity is taken out in procession on horse 'vahanam' they feed the members of Chettiar community. In *Radhakrishna Chettiar* v. *Commissioner H. R. & C. E.*[1], a Division Bench of this Court took the view that the charitable institution which fed Arya Vysya pilgrims to religious festivals upon stated occasions would be "a religious charity" even apart from the performance of pooja and nevedyam. The learned Judges following *Sri Venkatarama Deyaru* v. *State of Mysore*[2], held that the word "public" includes in its ordinary acceptation any section of the public. In *Ahmedabad Rana Caste Associa-*

1. (1960) M. W. N. 198 : (1960) 1 M. L. J. 494.
2. (1958) 1 M. L. J. (S. C.) 109 : 1958 S. C. J. 382 : 1958 S. C. R. 895 : (1958) 1 An. W. R. (S.C.) 109 : A. I. R. 1958 S. C. 255.

tion v. *Commissioner of Income-tax Gujarat*[1], the Supreme Court held that an object beneficial to a section of the public is an object of general public utility and to serve charitable purpose, it is not necessary that the object should be to benefit the whole of mankind or all persons in a particular country or state and that it is sufficient if the intention to benefit a section of the public as distinguished from a specified individual is present. D. W. 1 the only witness examined for the defendant has stated that he is not denying that the first plaintiff is the trustee. He has further admitted that he has gone to the Chettiar Chatram at Samayapuram and has also taken food. Therefore, it is clear that feeding of the Chettiar community by the plaintiff-trust was carried on. My attention was invited by the learned counsel for the appellant to the ruling in *Trustees of Gordhandas Govindram Family Charity Trust* v. *Commissioner of Income-tax, Bombay*[2]. That was a case where it was held that the trust concerned in that case was created primarily for the benefit of the members of the family of Gordhandas Govindram Seksaria and that fact is clear from the title given to the trust as well as from the various provisions of the trust deed and therefore the Supreme Court held that it is not possible to hold that the trust in question is a trust for any public purpose, and that it is purely a private trust. Such, however, is not the case here. The primary purpose of the settlor was not to benefit the members of his family. In the instant case, the charity is to feed the members of Chettiar Community on certain occasions during the festival at Samayapuram. The finding by the District Judge that the trust in question is a public trust is accepted. The plaintiff-trust which is a public trust will be entitled to the benefits of exemption from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, by virtue of G. O. Ms. No. 2000, Home, dated 16th August, 1976. The suit is therefore perfectly maintainable.

9. I have already extracted the substantial question of law formulated by one of the learned Judges of this Court at the time of admission of the second appeal. It has been found that the trust in question is a public trust. Therefore, the suit for eviction is perfectly maintainable in a civil Court. As regards the question whether G. O. Ms. No. 2000, Home, dated 16th August, 1976, is applicable only to public trusts and not to private trusts. I must at once point out that the G. O., itself which modifies the earlier G. O. Ms. No. 1998, Home, dated 12th August, 1974, exempts all the buildings owned by the Hindu, Christian and Muslim religious public trusts and public charitable trusts from all the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Balasubrahmanyan, J., in *S. A. Appal Raja* v. *Common Fund of Senguntha Mudaliar Community*[1], had occasion to deal with the earlier notification dated 12th August, 1974 and the subsequent notification dated 16th August, 1976, which superseded the earlier notification dated 12th August, 1974. The learned Judge was of the view that the notification dated 12th August, 1974, refers only to public religious trusts as the words "religious trusts" are preceded by the words 'Hindu, Christian and Muslim' and if the intention were to refer to private trusts, the reference to the three great religious denominations would have been quite unnecessary and likewise the expression "Charitable Institutions" will only refer to public charitable institutions and that the prior notification dated 12th August, 1974, while it referred to Hindu, Christian and Muslim religious trusts and charitable institutions, had in mind only public religious trusts and public charitable institutions and the subsequent notification dated 16th August, 1976, did not make for a departure in the Government's exemption policy, but only made explicit what was made implicit in the earlier notification. This view of the learned Judge would show that both the notifications exempted only public trusts. The question whether the earlier notification is applicable to both the trusts is purely academical in view of the fact that it has now been superseded. But, I

1. (1972) 1 S. C. R. 744 : (1972) 1 S. C. J. 458 (1972) 1 I. T. J. 386 : (1972) Tax. L. R. 78: 82 I. T. R. 784. : A.I. R. 1972 S. C. 273

2. (1973) 2 S.C. J. 533 : 88 I. T. R. 47 : 1973 Tax. L.R. 1936 : (1973) 3 S. C. C. 346 : (1973) 2 I.T.T. 441 : A. I. R. 1973 S. C. 623.

1. (1982) 1 M. L. J. 318 : (1982) 2 R. C. J. 505 : 95 L. W. 156.

may point out, with respect to the learned Judge, that the earlier notification, in my view, would apply to both private and public trusts and not to public trusts alone. Or else, there was no reason for the Government to modify the orders in G. O. Ms. No. 1998, Home, dated, 12th August, 1974 so as to exclude private trusts from the exemption granted and to limit its application to public charitable trusts only, as seen from the notification. The mere fact that the words "Hindu, Christian, Muslim *religious trusts* and charitable institutions" occurring in the earlier notification are replaced by the words, "Hindu, Christian and Muslim *religious public trusts* and public charitable trusts" and the fact that the earlier notification is superseded by the later notification are clear indications that the earlier notification exempted both public and private religious trusts. There is no doubt that G. O. Ms. No. 2000, Home, dated 16th August, 1976, exempts all buildings owned by Hindu, Christian and Muslim religious public trusts and public charitable trusts from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. These points are found accordingly.

10. The result is, the second appeal is dismissed with costs throughout.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Nainar Sundaram, J.*

Vedagiri (Proposed party) ... *Petitioner**

v.

Pattammal and others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 22 (1), Explanation—*Respondent in an appeal whether can file memorandum of cross-objections against a co-respondent.*

A reading of the *Explanation* to Order 41, rule 22 (1) of the Civil Procedure Code, does not in any way convey the meaning that by virtue of this, a resspondent is entitled to prefer a cross-objection against another co-respondent. The very object and reason for the introduction of the *Explanation* is only to empower the respondent in an appeal to file cross-objections in respect of a finding adverse to him, notwithstanding that the ultimate decision is wholly or partly in his favour. [*Para.* 5.]

In view of the well-settled proposition of law, it is not possible to countenance and sustain the order passed by the Court below in permitting the bringing on record the fifth defendant as the fifth respondent in the cross-objections preferred by the other co-respondents to the appeal before it. [*Para.* 6.]

Cases referred to:—

Venkateswarlu v. *Ramamma*, I. L. R. (1950) Mad. 874 : (1950) 1 M. L. J. 54 : 63 L. W. 32 : A. I. R. 1950 Mad. 379; ***Munisami Mudali*** v. ***Abbu Reddy***, I. L. R. (1913) 38 Mad. 705 : 27 M. L. J. 740 (F. B.) ; *Pannalal* v. *State of Bombay*, (1964) 1 S. C. R. 980 : 66 Bom. L. R. 100 : A. I. R. 1963 S. C. 1516 ; *Devendra Ayyar* v. *Muthu Chettiar*, 47 L. W. 760 : A. I. R. 1938 Mad. 329.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chengalputtu, dated 4th August, 1982 and made in (1) in I. A. No. 778 of 1982 in A. S. No. 159 of 1980 (2) I. A. No. 19 of 1982 in A. S. No. 159 of 1980 respectively.

Sundaravaradan, for Petitioner.

Mohan, for Respondents 1 to 6.

K. S. Ahmed, for 7th Respondent.

A. S. Udayasankar, for Respondents 9 and 10.

The Court made the following

ORDER.— The appeal before the District Judge of Chengalpattu, A. S. No. 159 of 1980, has been preferred by the first defendant against the judgment and decree in O. S. No. 183 of 1976 on the file of the

*C. R. P. Nos. 4339 and 4340 of 1982.
25th March, 1983.

Subordinate Judge of Chengalpattu. The respondents in the said appeal are plaintiffs 1 to 6 and defendants 2 to 4 in the suit. The suit was one for partition and separate possession of the plaintiffs' one-fifth share and there was a controversy over the C schedule properties, which the fifth defendant claimed as his self-acquisitions. The first Court countenanced the case of the fifth defendant and the suit of the plaintiffs in respect of the C schedule properties was dismissed. The first Court passed a preliminary decree for partition of the plaintiffs' one-fifth share in the A schedule properties other than item No. 31, B schedule properties and C-1 schedule properties. The first defendant has filed the appeal, A. S. No. 159 of 1980. The plaintiffs, respondents 1 to 6 in the appeal, preferred cross-objections and they chose to implead only defendants 1 to 4 as respondents therein. We find that the appeal is of the year 1980. In December, 1981, the plaintiffs, respondents 1 to 6 in the appeal conceived an idea of impleading the fifth defendant as the fifth respondent in the cross-objections and took out two applications I. A. No. 19 of 1982 to condone the delay of 359 days in impleading the fifth defendant as the fifth respondent in the cross-objections and I. A. No. 778 of 1982 to implead the fifth defendant as the fifth respondent in the cross-objections. These two applications have been allowed by the Court below. The present revisions have been preferred by the fifth defendant against the orders of the Court below.

2. Mr. R. Sundara Varadan, learned counsel for the fifth defendant, petitioner in these two revisions, submits that it is a well-settled proposition that there could not be a cross-objection by one respondent against other co-respondents, save in exceptional cases and if this principle had been applied by the Court below, it would not have been ventured to consider the question of condoning the delay in bringing on record the fifth defendant as the fifth respondent in the cross-objections as well as impleading him as such. The proposition stated by the learned counsel is one countenanced by a Full Bench of five learned Judges of this Court in *Venkateswarlu* v. *Ramamma*[1]. The facts dealt with by the Full Bench are more or less similar to the facts of the present case. There was a suit for partition of the joint family properties, filed by the plaintiffs against their paternal uncle and his two sons (defendants 1 to 3) and in that suit, the plaintiffs had impleaded *inter alia* defendants 5 and 6 as persons in possession of certain items of the family properties. A preliminary decree was passed in favour of the plaintiffs. But, their claim with reference to the properties in the possession of defendants 5 and 6 was not countenanced. Defendants 1 to 3 preferred an appeal to the High Court, impleading only the plaintiffs and the fourth defendant as the respondents. In that appeal, the plaintiffs, who were respondents 1 and 2 therein, filed an application to implead the fifth defendant as a respondent in a memorandum of cross-objections sought to be filed by them against the decree of the first Court. It was found that on the date of that application a separate appeal against the fifth defendant was out of time. It was also admitted that the appellants (defendant 1 to 3) were not in any way interested in or concerned with the cross-objections sought to be preferred against the fifth defendant by respondents 1 and 2 (the plaintiffs). The Full Bench held that the application to implead the fifth defendant as a party either to the appeal or to the memorandum of cross-objection taken by a respondent in which the appellant has no interest cannot be treated as a 'cross-objection' within the meaning of Order 41, rule 22 of the Code of Civil Procedure. The Full Bench, consisting of five learned Judges of this Court, overruled the decision of the earlier Full Bench in *Munisami Mudaly* v. *Abbu Reddy*[1],

3. In *Pannalal* v. *State of Bombay*[2], five learned Judges of the Supreme Court, approved the following observations of Rajamannar, CJ., in *Venkateswarlu* v. *Ramamma*[3],

"The legislature by describing the objection which could be taken by the respon-

1. (1950) 1 M. J. 54 : 63 L. W. 32 : I. L. R. (1950) Mad. 874 : A. I. R. 1950 Mad. 379

1. (1913) I. L. R. 38 Mad. 705 : 2 M. L. J. 740 (F. B.)
2. (1964) 1 S. C. R. 980 : 66 Bom. L. R. 100 : A. I. R. 1963 S. C. 1516.
3. (1950) 1 M. L. J. 54 · I. L. R. (1950) Mad. 874 : A. I. R. 1950 Mad. 379.

dent as a 'cross-objection' must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent; the cross-objection might be an objection by a respondent against the appellant".

The Supreme Court delineated some of the exceptional cases in which a respondent in an appeal could prefer a cross-objection against other respondents, as including cases where the relief sought against the appellant in such an objection is inter-mixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and the other respondents.

4. The well-accepted ratio has been followed by a Bench of this Court, to which I have been a party, in *H. N. Govinda* v. *H. N. Sundara Bai*[4]. The first defendant, who is the appellant in the present appeal, is admittedly not interested in the C Schedule properties and the fifth defendant alone is interested in them. The matter also cannot be brought within the concept of exceptional cases as delineated by the Supreme Court.

5. The Court below refers to the *Explanation* added on to sub-rule (1) of rule 22 of Order 41 of the Code of Civil Procedure, by Central Act CIV of 1976, to state that this would enable a respondent to perfer cross-objections as against a co-respondent. The said *Explanation* reads as follows :

> "A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is wholly or in part, in favour of that respondent."

A reading of the *Explpnation* does not in any way convey the meaning that by virtue of this, a respondent is enabled to prefer a cross-objection against another co-respondent. The very object and reason for the introduction of the *Explanation* is only to empower the respondent in an appeal to file cross-objection in respect of a finding adverse to him, notwithstanding that the ultimate decision is wholly or partly in his favour. The Court below erred in placing reliance on this *Explanation* while deciding the matter. The Court below has also relied on a decision of Abdur Rahman, J., in *Devendra Ayyar* v. *Muthu Chettiar*[1], where the learned Judge, following the ratio of the earlier Full Bench in *Munisamy Mudaly* v. *Abbu Reddy*[2], held that a memorandum of cross-objection could be filed by a respondent against a co-respondent in an appeal as the powers given to the Court under Order 41, rule 22 of the Code of Civil Procedure, are wide enough for such purposes. This decision of the learned single Judge, Abdur Rahman, J., has lost its force because the ratio of the earlier Full Bench adopted by the learned single Judge has been over-ruled by the subsequent Full Bench, consisting of five learned Judges of this Court. Hence, the reliance placed by the Court below on the judgment in *Devendra Ayyar* v. *Muthu Chettiar*[1], cannot be upheld. In fact, the later Full Bench considered the question and decided overruling all previous decisions, and expressed the view as stated above.

6. In view of the well-settled proposition of law, it is not possible to countenance and sustain the orders passed by the Court below and this obliges me to interfere in revision. Accordingly, these revisions are allowed. There will be no order as to costs.

7. The appeal is of the year 1980 and the Court below will do well to dispose of the same expeditiously.

R. S. —— *Petition allowed.*

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4. A. S. No. 657 of 1974. dated 26th June, 1978.

1. (1938) 47 L. W. 768 : A. I. R. 1938 Mad. 329.
2. (1913) I. L. R. 38 Mad. 705 : 27 M. L. J. 749.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*S. Nainar Sundaram, J.*

G. N. Sridharan ... *Petitioner**

v.

The Union of India, represented by Secretary to Government of India, Ministry of Finance, New Delhi and others ... *Respondents.*

(A) *Life Insurance Corporation of India Act (XXXI of 1956), section 49—Life Insurance Corporation of India (Staff) Regulations (1960), regulations 4 and 58—Scope of regulation 58—Settlement between Federation of Class I Officers and Corporation, 1970 and Chairman's Instructions, 1970—Extent of Chairman's powers—Word 'may' occurring in settlement, and words "and the subsequent financial years" occurring in the Instructions—Construction of—Bonus paid for two years as per Instructions after specified period—Effect—Circular issued on 26th September, 1975, intimating bonus would not be paid pending review of question—Circular dated 23rd June, 1976, intimating rescinding of 1970 agreements and Instructions regarding bonus—Validity of circulars challenged.*

(B) *Constitution of India*(1950), *Article 14—Order dated 22nd September, 1978, relating to ex-gratia payment in lieu of bonus to Class I Officers—If repugnant to Article 14 as discriminating between one Class I Officer and another Class I officer—Validity of order upheld.*

The writ petitions relate to claim for bonus by Class I Officers of the Life Insurance Corporation of India. Regulation 58 of the Life Insurance Corporation of India (Staff) Regulations made under section 49 of the Life Insurance Corporation of India Act, 1956, dealt with payment of bonus and Regulation 4 empowered the Chairman of the Corporation to issue instructions to carry out the provisions of the Regulations. Regulation 58 as substituted in 1971 read: "The Corporation may, subject to such directions as the Central Government may issue, grant non-profit sharing bonus to its employees and the payment thereof, including conditions of eligibility for the bonus shall be regulated by instructions issued by the Chairman from time to time". Negotiations between the Federation of Life Intruetion Corporatian of India Class I Officers' Association and the Corporation had led to the settlement relating to bonus dated 14th August, 1970, which was to enure for 4 years from 1st April, 1969. This was followed by the Chairman's Life Insurance Corporation (Bonus to Class I Officers) Instructions, 1970 on 16th September, 1970. Clause 2 of the Instructions read: "These instructions shall apply in respect of grant of bonus for the financial year commencing on 1st April, 1969, and the subsequent financial years. Bonus was disbursed accordingly not merely for the four year period but also for 2 years thereafter. Class III and Class IV employees were covered by separate settlements of 1974. While so a Circular, dated 26th September, 1975 announced that no bouns under the existing settlements would be paid to the employees until further instructions, as the question of bonus was being reviewed. In March, 1976, the Life Insurance Corporation of India (Modification of Settlements) Act, 1976, amending the Payment of Bonus Act was enacted purporting to rescind all the settlements relating to Class III and Class IV employees. The Bonus Act did not apply to Class I employees. The Chairman of the Corporation issued an order on 22nd July, 1976 stating that bonus as per the Payment of Bonus Act, 1965, will no longer be paid, that an *ex gratia* payment in lieu of bonus as determined by the Central Government will be paid and that all the settlements and instructions including those of 1970 relating to Class I Officers stood rescinded. The Supreme Court decision in *Pathak's case*, (1978) 2 S. C. C. 50 : A. I. R. 1971 S. C. 803 struck down the 1976 Act but the decision did not touch Class I Officers. On 22nd September, 1978 an order was issued relating to payment of *ex gratia* amount in lieu of bonus to Class I and Class II Officers and the method of computing the

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*W. P. Nos. 3972 and 3973 of 1978.

8th October, 1982.

same was specified. Writ petitions were filed impugning the validity of the circulars, dated 23rd September, 1975 and 23rd July, 1976 and for consequential reliefs. It was contended on behalf of the petitioners that : (1) notwithstanding the 4 year period set by the settlement of 1970, the expression "and the subsequent financial years" occurring in the Chairman's Instructions clause 2 abrogates that limit and the Corporation should continue to honour its obligation for the years subsequent to 31st March, 1973; (2) since the Corporation had actually paid bonus for 1973-74 and 1974-75 it was referable only to the 1970 Instructions and the disbursement must have had the backing of a grant by the Corporation and as such entitled the Class I Officers, to claim bonus as of right; (3) the word "may" occurring in Regulation 58 must be read as "shall" and the Corporation shall grant bouns to its Class I Officers; (4) since the policy behind the impugned proceedings of 22nd July, 1976 was to deny bonus to all classes of employees and since the claims of Class III and Class IV employees have survived after the Supreme Court decision in *Pathak's case*, (1978) 2 S. C. C. 50 : A. I. R. 1978 S C. 803 striking down the Life Isurance Corporation (Modification of Settlements) Act, 1978, it would be discriminatory to deny bonus to Class I Officers; and (5) the order of 23rd September, 1978 as to *ex gratia* payment to Class I Officers is violative of Article 14 of the Constitution as discriminatory between one Class I officer and another Class I Offieer in calculating the *ex gratia* payment.

Held : The Chairman, by himself cannot make a grant of bonus within the meaning of Regulation 58. The grant has to emanate from the Corporation and the Chairman's power is limited to give effect to and carry out the same and to regulate the payment thereof including the conditions of eligibility for the bonus. If the settlement of 1970 is a 'grant' within the meaning of Regulation 58, the Chairman by his Instructions of 1970 could not enlarge the scope of the grant. [*Para.* 8.]

Since the Chairman, by himself, has no power to make a grant of bonus his Instructions can only fall in line with the terms of the grant. Hence the expression "and the subsequent financial years" in clause 2 of the Instructions has reference only to the period set out and derivable from the Settlement of 14th August, 1970. To hold otherwise would be a case of the Chairman enlarging the scope of the grant. [*Para.* 8.]

The mere fact that bonus was disbursed to Class I Officers for 2 years subsequent to the expiry of the period set out in the 1970 settlement will not provide them with a lever which would afford a legal basis to claim bonus as of right. The Instructions of 1970 lost their force after 31st March, 1973. It was redundant to rescind or cancel the Settlement or the Instructions of 1970, when the proceeding dated 23rd June, 1976 were issued. The proceedings only made clear the position with regard to non-eligibility of Class I Officers for bonus. The Corporation cannot ignore the directions of the Central Government as grant of bonus by it was subject to the directions of the Central Government. [*Para.* 9.]

The word 'may' in Regulation 58 cannot be read as shall, there being no warrant for giving it any but the ordinary meaning. To give a different meaning is to rescind the Regulation and cast an obligation on the Corporation which it does not bear under any law. [*Para.* 10.]

The Supreme Court decision dealt only with the 1974 Settlements relating to Class III and Class IV employees which had a binding force under section 18 (1) of the Industrial Disputes Act. Class I Officers stand on a different footing, their rights if any, for bonus being referable to and derived from the grant under Regulation 58. The striking down of the denial of bonus to Class III and Class IV employees does not mean that the denial of bonus to Class I officers cannot also survive. [*Para.* 11.]

It is true that under the impugned order dated 13th September, 1978 Class I Officers drawing salary in excess of Rs. 1, 600 per month are not eligible for *ex gratia* payment in lieu of bonus. It is a result of policy decision of the Corporation. The rationale behind it is not new. It has been the rationale of payment of bonus earlier. Tho classification is not improper and does not offend Article 14 of the Constitution. [*Para.* 13 and 14.]

Cases referred to:—

M. M. Pathak v. *Unlon of India*, 1978 Lab. I. C. 612; (1978) 2 S. C. C. 50: (1978) 3 S. C. R. 334: A. I. R. 1978 S. C. 803; *State of J. & K.* v. *T. N. Khote*, 1974 Lab. I. C. 1: (1974) 1 S. C. C. 19: (1974) 1 S. C. J. 366: A. I. R. 1974 S. C. 1; *S, Kader* v. *State of Kerala*, 1974 Tax. L. R. 2220: 34 S. T. C. 73: (1974) 4 S. C. C. 422: (1975) 1 S. C. R. 121: A. I. R. 1974 S. C. 2272.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue (1) a writ of *certiorari* calling for the records relating to the order of the 3rd respondent in Pers/B/ZD/365, dated 23rd October, 1975 and quash the same insofar as it affects the petitioner herein (in W. P No. 3972 of 1978; and (2) a writ of *certiorari* filed *manadmus* calling for the records of the second respondent dated 22nd June, 1976 communicated in the order of the 3rd respondent Circular No. 354/ASP/76 dated 23rd June, 1976 and quashing the same in so far as it affects the petitioner and directing the 2nd respondent to pay bonus to the petitioner for the years 1975-76, 1976-77 and 1977-78 in accordance with Life Insurance Corporation (Bonus to Class I Officers) Instructions 1973 dated 16th October 1970 as amended (in W. P. No. 3973 of 1978).

P. Chidambaram, for Petitioner.

Miss. Isaimathy, for *Raj and Raj*, for Respondents.

The Court made the following

ORDER.—Thepetitioner in these two writ petitions is one and the same and the respondents are also the same in both the writ petitions. The petitioner is a Class I Officer in the Life Insurance Corporation of India hereinafter referred to as the Corporation. The prayer in W. P. No. 3972 of 1978 is for the issue of a *certiorari* calling for the records relating to the order of the third respondent — Executive Director (Personnal), Life Insurance Corporation of India, Bombay, in Ref.: Personnel 1/B/ZD/365, dated 23rd September, 1978 and quash the same in so far as it affects the petitioner. The prayer in W. P. No. 3973 of 1978 is for the issue of a writ of *certiorari fied mandamus*, calling for the records relating to the order of the second respondent —Life Insurance Corporation of India, represented by its Chairman, dated 22nd June, 1976 communicated in the order of the third represented in Circular. No. 3543/ASP/76, dated 23rd June, 1976 and quash the same in so far as it affects the petitioner and direct the second respondent to pay bonus to the petitioner for the years 1975-76, 1976-77 and 1977-78, in accordance with Life Insurance Corporation (Bonus to Class I Officers) Instructions 1970, hereinafter referred to as the Instructions 1970, dated 16th September, 1970 as amended.

2. At the outset, it must be pointed out that the controversy in both the writ petitions relates to the claim for bonus For Class I Officers of the Corporation. For the purpose of appreciating and assessing the grievance of the petitioner and his attack on the two proceedings subject-matter in the two writ petitions as, it becomes necessary to briefly trace what transpired earlier and that too, with reference to the statute concerned and the Regulations that came to be passed thereunder. The statute is the Life Insurance Corporation Act, 1956, hereinafter referred to as the Act. The Constitution of the Corporation has been done under section 4 (1) of the Act and one of the members who go to constitute the corporation shall be appointed by the Central Government to be the Chairman thereof. Section 49 enables the Corporation to make regulations and such regulations may provide for the terms and conditions of service of the employees of the Corporation. This is found from clauses (*b*) and (*bb*) of sub-section (2) of section 49 of the Act. The said power was exercised and the result is the making of the regulation which bears the nomenclature, Life Insurance Corporation of India (Staff) Regulations, 1960, hereinafter referred to as the Regulations. Regulation 4 gives the power to the Chairman to issue instructions and directions from time to time, as may be necessary to give effect to, and carry out, the provisions of the Regulations. Regulation 58 governs the payment of bonus. Admittedly, Regulation 58 has undergone amendments from time to time. Until 1967, Regulation 58 enabled the Corporation to pay non-profit sharing bonus to its employees belonging

to Classes III and IV. By notification dated 11th February, 1967, regulation 58 was substituted and the substituted regulation read as follows :

> "The Corporation may, subject to such directions as the Central Government may, issue from time to time, grant non-profit sharing bonus to its employees".

By notification dated 7th August, 1971, regulation 58 was again substituted and the substituted regulation read as follows :

> "The Corporation may, subject to such directions as the Central Government may issue, grant non-profit sharing bonus to its employees and the payment thereof, including conditions of eligibility for the bonus, shall be regulated by instructions issued by the Chairman from time to time".

3. A plain reading of regulation 58, as substituted above, conveys the meaning that there are two sets of powers with regard to bonus. The Corporation may. subject to such directions as the Central Government may issue, grant non-profit sharing bonus to its employees. This is the first part of regulation 58. On the basis of the grant, the payment thereof including the conditions of eligibility for bonus shall be regulated by instructions issued by the Chairman from time to time. This is the second part of Regulation 58. Regulation 58 which was anterior to the substitution by notification dated 7th August, 1971, spoke only about the grant of bonus by the Corporation to its employees, subject to such directions that the Central Government may issue from time to time. It is not disputed that the Chairman has the power to issue instructions or directions to give effect to the grant of the bonus by the Corporation to its employees, under the Regulations and this he is enabled by Regulation 4 of the Regulations. The second part of Regulation 58, as substituted by notification dated 7th August, 1971, has merely exemplified the above position. Learned counsel for the petitioner has not put forth a proposition that the Chairman, by himself, could grant bonus to the employees of the Corporation and that his instructions could over-ride the terms of the grant, if any, made by the Corporation. The admitted case of the parties is that there were negotiations between the Federation of Life Insurance Corporation of India Class I Officers' Associations and the second respondent for the grant of bonus from time to time, from 1964-65 onwards and those negotiations matured themselves into agreements and the Chairman issued intructions to implement them and non-profit sharing bonus was paid to all Class I Officers in accordance with the agreements and the instructions which followed. The last agreement between the Federation and the second respondent was the one dated 14th August, 1970. We are not concerned with the other terms of the settlement except the one that relates to the grant of bonus. Learned counsel for the respondents has furnished me a copy of the terms of settlement arrived at on 14th August, 1970, and Clause IV thereof provides for payment of bonus at the rate of one and a half months' basic pay as on 31st March, of the year to which the bonus relates subject to a maximum bonus of Rs. 1,200. Clause V thereof speaks about the effective date of revision as 1st April, 1969, and Clause VI lays down the duration of the settlement as four years, *i. e.*, upto 31st March, 1973. This settlement was followed up by the Instructions issued by the Chairman on 16th September, 1970, bearing the nomenclature, Life Insurance Corporation (Bonus to Class I Officers) Instructions 1970. Clause 2 of Instructions 1970 provided as follows :

> "These instructions shall apply in respect of grant of bonus for the financial year commencing on 1st April, 1969, and the subsequent financial years."

The set of expressions "and the subsequent financial years" is sought to be construed in two ways, one by the learned counsel for the petitioner and the other by the learned counsel for the respondents. I will presently advert to this aspect.

4. Bonus to Class I Officers was disbursed for the years 1969-70, 1970-71, 1971-72, 1972-73, 1973-74 and 1974-75. There could not be any dispute with regard to the

sanction for the disbursement of bonus upto the year 1972-73. Learned counsel for the respondents would submit that the terms of settlement dated 14th August, 1970 followed by Instructions 1970 governed such disbursement and that the disbursement of bonus for the years 1973-74 and 1974-75 was not pursuant to Instructions 1970, because the period stipulated under the settlement dated 14th August, 1970, on the basis of which alone Instructions 1970 came to be issued, lapsed with the end of the year 1972-73. Learned counsel for the petitioner has got his own construction to be put on the set of expressions "and the subsequent financial years" occurring in clause 2 of Instructions 1970 and would say that the sanction and instructions would govern the disbursement of bonus for the period subsequent on 1972-73. Reserving the resolution of the controversy to a subsequent stage, I shall complete, the narration of the events which led to the passing of the impugned proceedings.

5. Neither the Payment of Bonus Act nor the Industrial Disputes Act could apply to Class I Officers of the Corporation. There was a circular dated 26th September, 1975, issued by the third respondent, by which he informed all the officers of the Corporation that the question of payment of bonus was being reviewed in the light of the Ordinance dated 25th September, 1975, and hence, no bonus to employees should be paid under the existing provisions until further instructions. So far as Class III and Class IV employees are concerned, their right to bonus was governed by two settlements, one dated 24th January, 1974, and the other dated 6th February, 1974. In March, 1976, the Life Insurance Corporation (Modification of Settlements) Act, 1976 was enacted, purporting to rescind the two settlements dated 24th January, 1974 and 6th February, 1974 with reference to Class III and Class IV employees of the Corporation. The Chairman of the Corporation passed an order on 22nd June, 1976, on the question of payment of bonus to the employees of the Corporation, which order was reproduced in the communication of the third respondent dated 23rd June, 1976, which is the subject-matter of challenge in W. P, No. 3973 of 1978. It is worthwhile to have the entire communication extracted as follows, even though the attack is on the clauses relating to bonus to class I Officers of the Corporation.

"LIFE INSURANCE CORPORATION OF INDIA (CENTRAL OFFICE)

Ref : Personnel . A. 'Yogakshema'
Jeevan Beema Marg,
Bombay-400002.
June 23, 1976.

To

All the Officers of the Corporation.

Ref : —Payment of Bonus to the Employees of the Corporation

"By our circular Ref : Personnel—A. No. 35 38/ASP/76 dated 22nd March, 1976, we had advised all the offices of the Corporations that until further instructions. no payment by way of bonus should be made to any employee irrespective of the class to which he belongs. In this connection, Chairman has issued an order, which is reproduced below.

i). The Payment of Bonus Act, 1965, has been amended by Act XXIII of 1976 retrospectively from 25th September, 1975. In terms of the provisions of section 32 of the said Act, nothing in the said Act shall apply to the employees employed by the Life Insurance Corporation of India. The employees of the Life Insurance Corporation of India are, therefore ineligible to bonus under the said Act. The Central Government however, have decided that such employees shall be paid an amount *ex gratia* in lieu of bonus, as may be determined by the Central Government taking into account the wage levels, the financial circumstances and other relevant factors.

ii). In view of the above, no employee of the Corporation shall be eligible for bonus for the financial year 1975-76 and thereafter under the following agreements/ settlements/ administrative instructions which are hereby replaced/rescinded :—

1) Agreement dated 25th September, 1970, between the National Federation of

Insurance Field Workers of India and the Life Insurance Corporation of India;

(2) Administrative instructions called the Life Insurance Corporation (Bonus to Development Officers) Instructions, 1970 as amended from time to time.

(3) Circulars issued by the Corporation from time to time in pursuance of the aforesaid agreement dated 25th September, 1970, and the Life Insurance Corporation (Bonus to Development Officers) Instructions, 1970;

(4) Agreement dated 14th August, 1980, between the Federation of Life Insurance Corporation of India Class I Officers' Associations and the Executive Director (Personnel) Life Insurance Corporation of India ;

(5) Life Insurance Corporation (Bonus to Class I Officers) Instructions 1970 dated 16th September, 1970, as amended from time to time;

(6) Administrative instructions issued from time to time in pursuance of the agreement dated 14th August, 1970, between the Federation of Life Insurance Corporation of India Class I Officers' Associations and the Executive Director (Personnel) Life Insurance Corporation of India, and the Life Insurance Corporation (Bonus to Class I Officers) Instructions, 1970.

(*iii*) As regards Class III and Class IV employees, under the Life Insurance Corporation (Modification of Settlements), Act, 1976, the provisions in the settlements dated 24th January, 1974 and 6th February, 1974, with the Class III and Class IV Employees' Associations shall not have any force or effect and the provisions of the said settlements are set aside in so far as they relate to the payment of an annual cash bonus.

(*iv*) All the administrative instructions issued in pursuance of the said settlements dated 24th January, 1974 and 6th February, 1974, therefore, stand hereby repealed/ rescinded.

Dated at Bombay, this 22nd day of June, 1976. Sd. (K B. Pradhan) Chairman

2. As regards *exgratia* payment in lieu of bonus. appropriate instructions will be issued in due course.

EXECUTIVE DIRECTOR."

6. The Life Insurance Corporation (Modification of Settlement) Act, 1976, was challenged before the Supreme Court and the Supreme Court struck down the said Act as illegal and void. The decision of the Supreme Court is reported in *M. M. Pathak* v. *Union of India*[1]. The said decision did not touch the claim for bonus by Class I officers of the Corporation. They are stated to have carried on their agitation through the Federation and it is stated that two class I Officers and the Federation jointly filed a writ petition in the High Court of Delhi in Civil Writ No. 587 of 1978, challenging the circular dated 26th September, 1975, as well as the order dated 23rd June. 1976, and to command the second respondent to continue to pay the bonus to all Class I Officers of the Corporation on the basis of the Bonus Instructions, 1970 as amended, for the years, 1975-1976, 1976-1977 and 1977-1978 as well as for subsequent financial years, While the said writ petition was pending in the High Court of Delhi, the third respondent issued an order dated 23rd September, 1978, which is the subject-matter of challenge in W. P. No. 3972 of 1978 and the said order reads follows :

"LIFE INSURANCE CORPORATION OF INDIA

Central Office

Ref : Personnel B/ZD/365.

23rd September, 1978

TO ALL ZONAL MANAGERS AND OFFICERS IN CHARGE OF DIVNS :

Ref : Payment of *ex gratia* amount in lieu of bonus to Class I and Class II Officers for the years 1975-76, 1976-1977.

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1. (1978) Lab. I. C. 61 : (1978) 2 S. C. C. 50: (1978) 3 S. C. R. 334: A. I. R. 1978 S. C. 803.

"It has been decided to make an *ex gratia* payment in lieu of bonus to the Class I and Class II Officers of the Life Insurance Corporation of India for the years 1975-1976 and 1976-1977 at the rate of 8.1/3% of their salary (Basic pay+Spl. pay if any +D. A.+Addl. allowance). The *ex gratia* amount will be paid only to those officers who were in receipt of salary pay+DA+DA upto Rs. 1,600 p. m. Further, the maximum salary (PAY+DA+DA) for the purpose of calculation of the *ex gratia* payment will be deemed to be Rs. 750 per month. We may clarify that the *ex gratia* payment may be calculated on the basis of salary drawn by an officer in each month during the period from 1st April, 1975 to 31st March, 1977 in order to determine whether in a particular, month, the officer would have satisfied the eligibility criteria for receiving the payment.

For example, if an officer had drawn a salary (Pay+DA+DA of Rs. 1,600 or less in a particular month he would be eligible for the *ex gratia* payment for that particular month, but if the same officer had drawn a salary in excess of Rs. 1,600 in any other month during the period in question, he would not be eligible for the payment for the months in which he had drawn a salary in excess of Rs. 1,600.

In the case of employees who opted for fixation in class I cadre from a date after 1st April, 1975, the bonus as per the above instructions shall be calculated till the date of fixation, on the pay they were actually drawing plus notional admissible DA and AA for that pay as applicable to Class I, porvided such pay plus DA andAA did not exceed Rs. 1,600 in any particular month. The *ex gratia* payment may also be made to those, who had retired or died during the period in question, if they would have been otherwise, eligible for such payment. Officers who had resigned and/or whose services were terminated as a disciplinary measure will not receive this payment.

You are now requested to arrange for the payment at an early date. Please send us a list of officers who have been paid this *ex gratia* amount, specifying the amount paid to individual officers.

Please acknowledge receipt.

Sd/Executive Director.

P. S. : *Ex-gratia* payment shall not be made for the period of apprenticeship or training on stipend but shall include service on production."

7. It is now found that the High Court of Delhi has disposed of Civil Writ No. 587 of 1978 and the writ petition was partly allowed declaring that the circular dated 23rd June 1976, would not operate for the year 1975-76 but would operate from the year 1976-77 onwards, subject to later circular or orders. How far the parties could take advantage of the decision of the High Court of Delhi will also be the subject-matter of discussion that would follow hereafter.

8. The major issue is one that is raised in W. P. No. 3973 of 1978. I first propose to deal with the same, With regard to the claim for bonus for the year 1975-76, practically it has lost its significance because, subsequent to the judgment of the High Court of Delhi in Civil Writ No. 587 of 1978 and while the writ petitions were pending, the Corporation, by circular Ref : Personnel/B/ZD/38 dated 8th March, 1979, decided to make the payment of bonus to Class I Officers of the Corporation in accordance with the terms of Instructions 1970. The sheet anchor of the claim for bonus for class I Officers of the Corporation, the petitioner being one of them, is the settlement dated 14th August 1970, which was followed up by Instructions 1970 of the Chairman. The terms of the Settlement are unambiguous. They could be effective only from 1st April, 1969 and upto 31st March, 1973. This settlement cannot have the sanctity of a settlement which is arrived at, either, in the course of the conciliation proceeding or otherwise than in the course of the conciliation proceeding so as to attract the provisions of the Industrial Disputes Act. Class I Officers of the Corporation fall outside the purview of the Industrial Disputes Act. Mr. P. Chidambaram, learned counsel for the petitioner wants to elevate the settlement dated 14th August, 1970, as a grant within the meaning of regulation 58 of the Regulations. Mr. J. Kanagaraj, learned counsel appearing

for the respondents, of course, would not concede this position. But, the fact remains that there was grant of bonus by the Corporation and merely because it was preceded by a settlement, it cannot be stated that there was no grant at all within the meaning of Regulation 58. We are more concerned with the scope of the grant and the period to to which the grant could enure. As stated above, the settlement stipulated a period of four years from 1st April, 1969, upto 31st March, 1973. It is common case of both the sides that the Chairman by himself cannot make a grant of bonus within the meaning of Regulation 58. The grant has to emanate from the Corporation and the power of the Chairman is limited to give effect to and carry out the same and to regulate the payment thereof, including, the conditions of eligibility for the bonus. It is only for this purpose, the Chairman issued instructions from time to time. If the settlement of 14th August, 1970, is accepted to be a grant within the meaning of Regulation 58, then Instructions 1970 could not enlarge either the scope of the period of the grant. Mr. P. Chidambaram, learned counsel for the petitioner, wants to take advantage of the set of expressions "and the subsequent financial years" occurring in clause 2 of Instructions 1970 and would state that there is no limitation with regard to the period for payment of bonus to Class I Officers of the Corporation, and he wants the Corporation to adhere to and honour its obligations under Instructions 1970 for the years subsequent to 31st March, 1973. As against this Mr. J. Kanagaraj, learned counsel for the respondents, would submit that once it is admitted that the Chairman by himself has no power to make a grant of bonus and his instructions could only fall in line with the terms of the grant, it is not possible to put up a construction on the above set of expressions as the learned counsel for the petitioner would desire. Learned counsel for the respondents would further submit that such a construction would lead to results which would become irreconcilable not only with the factual position but also with the legal implications. Learned counsel for the respondents hence wants this Court to construe the set of expressions "and the subsequent financial years" in clause II of Instructions 1970 as meaning, and as referable to, the period set out in the settlement dated 14th August, 1970, namely, 1st April, 1969 to 31st March, 1973, "subsequent financial years", according ro the learned counsel for the respondents, could only mean the subsequent financial years after the lapse of the financial year commencing on 1st April, 1969, and this alone would be in accordance with the terms of the settlement, assuming that it could be equated to a grant. In my view, this is the only and the proper way to construe clause 2 of Instructions 1970. If the grant is that expressed in the settlement of 14th August, 1970, definitely, the Chairman, by his Instructions, cannot enlarge the scope of the grant. Hence, I am obliged to reject the plea of the learned counsel for the petitioner to give any sanction for bonus or any period of currency therefor other than the one derivable from the settlement of 15th August, 1970.

9. Mr. P. Chidambaram, learned counsel for the petitioner, would then submit that even after 31st March, 1973, the Corporation did pay bonus to its Class I Officers for the period 1973-75 and 1974-75 and this is referable only to Instructions 1970. Any right or claim by Class I Officers of the Corporation could have its source only pursuant to the grant under Regulation 58. Unfortunately for them. the Payment of Bonus Act does not come to their rescue and equally so, they are not in a position to agitate for such rights under the Industrial Disputes Act Realising this difficulty, learned counsel for the petitioner would submit that the disbursement of bonus for the years 1973-74 and 1974-75 must have had the backing of a grant by the Corporation. In my view, this is a submission made out of desperation. No plea has been put forth in the affidavit filed by the petitioner, expressing such a stand. The mere fact that bonus was disbursed to Class I Officers of the Corporation for the above two years concerned, will not provide them with a lever which would have a legal basis to claim bonus as of right. The grant or the sanction for bonus enured only upto 31st March, 1973. Hence Instructions 1970 lost its force after 31st March, 1973. It is redundant to rescind or cancel either the settlement dated 14th August, 1970, which has partaken the nature

of grant or Instructions 1970, which has no independent force other than the one derivable from the settlement or grant of 14th August, 1970. Merely because the impugned proceedings of the date 22/23rd June, 1976, came to be issued, purporting to rescind the settlement and Instructions 1970, it could not mean that the grant and Instructions, 1970, in fact survived beyond 31st March, 1973. The disbursement of bonus after 31st March, 1973, could not have had the backing of the settlement or grant of 14th August, 1970, and Instructions 1970. Learned counsel for the respondents would submit that payment of bonus for the years 1973-74 and 1974-75 was the result of independent subsequant negotiations, which he does not want to equate to grant. This is quite possible. Class I Officers of the Corporation must thank their stars that they had the benefit of payment of bonus even after 31st March, 1973, for two years. By the impugned proceedings dated 22/23rd June, 1976, the position was made clear with regard to non-eligibility of Class I Officers of the Corporation for bonus and it is true that this has afforded the provocation for filing the writ. Assuming the said Officers were paid bonus for the years 1973-74 and 1974-75 pursuant to independent grants, as pleaded by the learned counsel for the petitioner, the Central Government seemed to have decided to discontinue the same for future years and this decision has been acted upon, and it cannot be stated that the Corporation can ignore such directions because, under Regulation 58, the grant of bonus by the Corporation will have to be subject to the directions of the Central Government.

10. Another line of submission which the learned counsel for the petitioner put forth before me is that the expression 'may' occurring in Regulation 58 must be read as 'shall' and would state that the Corporation shall grant bonus to its Class I Officers, within the meaning of Regulation 58. Regulation 58 is only an enabling provision. There is no warrant for giving to the expression 'may' any meaning other than the ordinary one. If it is done otherwise, that would practically be re-enacting the regulation and casting an obligation on the Corporation, which it does not bear under any law. Further. such a construction would lead to anomalous results and it can be stated that the Corporation is bound to grant bonus, irrespective and in spite of instructions by the Central Government, otherwise.

11. Learned counsel for the petitioner would pursue his submission and would state that so far as Class III and Class IV employees of the Corporation are concerned, the impugned proceedings in W. P. No. 3973 of 1978 took note of the Life Insurance Corporation (Modification of Settlements) Act, 1978 and sought to ignore the settlements dated 24th January, 1974, and 6th February, 1974, for payment of bonus to them, this enactment was the subject-matter of challenge before the Supreme Court in *M. M. Pathak* v. *Union of India*[1], and the Supreme Court struck down the said Act as violative of Article 31 of the Constitution of India, and the policy behind the impugned proceedings of the date 22nd/23rd June, 1976, was to deny bonus to all classes of employees of the Corporation and since the claims of Class III and Class IV employees of the Corporation have survived after the decision of the Supreme Court referred to above, it would be discriminatory to deny any bonus to class I Officers of the Corporation, pursuant to the proceedings now impugned.

In this behalf, learned counsel for the petitioner says that the action of the Corporation is violative of Article 14 of the Constitution of India. First of all, it must be pointed out that the Supreme Court was dealing with two settlements of the date 21st January, 1974 and 6th February, 1974, entered into by the Corporation with its Class III and Class IV employees and the settlements did have a binding force under section 18 (1) of the Industrial Disputes Act. I do not think, in the instant case, it would be proper to adopt and follow the reasonings which weighed with the Supreme Court while arriving at the decision in the said case. Here, we are concerned, with Class I Officers of the Corporation. They stand on a different footing. Their rights and claims, if any, for bonus are referable to and deriv-

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1. (1978) 3 S. C. R. 334 : A. I. R. 1978 S. C. 803.

able from the grant under Regulation 58. It is true, by the impugned proceedings dated 22nd/23rd June, 1976 the subject-matter of challenge in W. P. No. 3973 of 1978, the entire questions of bonus to the employees of the Corporation was dealt with and the specific stand of the Corporation was expressed, denying bonus to all of them. The denial of bonus to class III and class IV employees of the Corporation has now been struck down by the Supreme Court in the case referred to above. On that ground, it cannot be stated that the denial of bonus to Class I Officers of the Corporation cannot also survxive and must be ignored and their claims must be countenanced, even though there is no legal and factual basis to support the same. It would be useful to advert to an obsesvation of the Supreme Court, occurring in the decision referred to above, of course, in a different context, where it is stated that:

> "It is the settled practice of the Court to decide no more than what is absolutely necessary for the decision of a case."

Equally, it is not argued before me that the decision of the Supreme Court would squarely enure to the benefit of Class I Officers of the Corporation. Class I Officers are far above Class III and Class IV employees of the Corporation and it is not a case of equals being treated unequally. When the impugned proceedings dated 22nd/23rd June, 1976, were issued, it cannot be stated that there was an omnibus consideration without reference to classification of the employees on the question of payment of bonus. A reading of the said proceedings, extracted supra, does not leave any such impression in the mind of this Court. May be, there had been a policy behind the said proceedings. But on the simple ground that the policy did not survive as against Class III and Class IV employees of the Corporation, it cannot be taken advantage of to strike down the other decisions with reference to class I Officers of the Corporation. They belong to different classes and categories. Hence, in my view, it is a misnomer to refer to and rely on Article 14 of the Constitution of India to spell out any discrimination in the instant case.

12. The only other aspect which remains is the decision of the High Court of Delhi in Civil Writ No. 587 of 1978. A copy of the judgment has been furnished to me. I find that the petitioner could not, and in fact his learned counsel did not place any reliance on the reasonings of the High Court of Delhi except to take advantage of the relief, which was partly given when the Court said that the impugned circular dated 23rd June, 1976, would not operate for the year 1975-76 but would operate from the year 1976-1977 onwards. The reason for giving even this much of relief is not the one adopted by the learned counsel for the petitioner for sustaining the plea with regard to the claim for bonus for the periods after 1975-76. As stated above, the claim for bonus for the year 1975-76 has been settled by the Corporation by circular dated 8th March, 1979.

For all the above reasons, I do not find a warrant to contenance the contentions put forth to support the prayer in W. P. No. 3973 of 1978.

13. Now, coming to the grievance of the petitioner with regard to the order of the third respondent dated 23rd September, 1978, learned counsel for the petitioner would submit that the said order is violative of Article 14 of the Constitution of India because, it discriminates between one Class I Officer and another Class I Officer since by the said order, the basis for calculation of the *ex gratia* payment in lieu of bonus has been defined as "salary (Basic pay, Special pay, if any, D. A. Adj. Allce)" and all Class I Officers who received a salary in excess of Rs. 1,600 per month are excluded. Learned counsel for the petitioner would state that the consequence is that about 94 per cent. of the 4,100 Class I Officers in the Corporation will stand excluded. Learned counsel for the petitioner would further submit that under the impugned order, for the purpose of calculation the maximum salary shall be deemed to be Rs. 750 per month and if this is so, no reason why a class I Officer drawing more than Rs. 1,600 per month should be denied bonus because, even in such a case, the deemed maximum salary of Rs. 750 could be applied and a class I Officer drawing a salary of more than Rs. 1,600 per month could also be paid bonus at the same rate. Learned counsel for the

petitioner characterises the impugned order as irrational and discriminatory and states that it brings about a classification within a class.

As against this, learned counsel for the respondents would submit that what was sought to be disbursed was payment of *ex gratia* amount in lieu of bonus and classification, according to him, can always be made between persons receiving higher salary and and those receiving lesser salary and it would be a well-recognized clssification even in the matter of payment of bonus. Learned counsel for the petitioner relies on the following observation occurring in the judgment of the Supreme Court in *State of J. & K.* v. *T. N. Khosa*[1].

> "Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved"

By virtue of the impugned order dated 23rd September, 1978, it is true that Class I Officers drawing salary in excess of Rs. 1,600 per month are not eligible for the *ex gratia* payment in lieu of bonus. This payment cannot be insisted as a matter of right. It is the result of a policy decision of the Corporation. The rationale behind it is not new and one adopted for the first time. This has been the rationale for the payment of bonus earlier.

14. It is not disputed that the earlier settlement dated 7th August, 1966, provided for payment of bonus to Class I Officers whose pay did not exceed Rs. 1,600 per month and there was a further provision that bonus shall be paid on a basic pay of Rs. 750 per month and this ratio has been followed up for the subsequent years until the settlement of the date 14th August, 1970. It is true that the Payment of Bonus Act does uot apply to the case on hand, but, yet to find out the rationale behind the impugned order dated 23rd September, 1978, it will be extraneous to refer to the definition of an employee under section 2 (13) of the said Act. It defines an "employee" as a person employed on a salary or wage not exceeding one thousand and six hundred rupees per mensem. If this aspect has weighed with the Corporation it is not possible to characterise the said action as completely irrational. Obviously the object is to benefit those who draw a lesser salary and who, normally, would have the benefit of the Payment of Bonus Act, but for the fact that the application of the provisions of the said Act has been excluded to the employees of the Corporation. Learned counsel for the respondents draws my attention to a decision of the Supreme Court in *S. Kodar* v. *State of Kerala*[1], where it has been held that classification of dealers on the basis of their respective turnover for the purpose of graded imposition so long as it is based on differential criteria relevant to the legislative object to be achieved is not unconstitutional. In my opinion the said ratio can be applied to the instant case. Viewed in the above light, I am not able to appreciate and sustain the grievances of the petitioner with reference to the order dated 23rd September, 1978, subject-matter of challenge in W. P. No. 3972 of 1978. This obliges me to dismiss both the writ petitions.

15. Accordingly, both these writ petitions will stand dismissed. There will be no order as to costs,

S. J. —— *Writ petitions dismissed.*

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1. 1974 Lab. I. C. 1 : (1974) 1 S. C. C. 19 : (1974) 1 S. C. J. 366 : A. I. R. 1974 S.C. 1 at 11.

1. 1974 Tax. L. R. 2220 : 34 S. T. C. 73 : (1974) 4 S.C.C. 422 : (1975) 1 S. C. R. 121 ; A. I. R. 1974 S. C. 2272.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R Gokulakrishnan and S. Nainar Sundaram, JJ.*

G. A. Valambal ... *Appellant**

v.

The Idol of Sri Madhyarjuneswararaswami Temple at Pettavaithalai represented by its Executive Officer, Gosi Chetty Street, Woraiyur ... *Respondents*.

(A) *Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), sections 9 and 4—Simultaaneous proceedings before the authorities under the Act and before the civil Court—Authorities under specified Act bound by decision of Civil Court on jurisdictional matters.*

(B) *Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 40—Applicability.*

The appellant, claiming to be the adopted daughter of one "*A*" who was the last service-holder of a devadasi inam attached to the respondent-temple, after the ceasing of devadasi services by reason of the Madras Devadasis (Prevention of Dedication) Act (XXXI of 1947), applied for the grant of a patta under section 15 of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1963. The repondent-temple applied to the H. R. & C. E. Board under section 87 of the Act XIX of 1961 (corresponding to section 101 of Tamil Nadu Act XXII of 1959), for a certificate enabling the concerned authorities to take possession of the lands. The certificate was granted but was quashed by the High Court in writ proceedings. The respondent-temple then filed a suit in the lower Court for recovery of possession and other reliefs. The Court decreed the suit. It found also against the alleged adoption of the appellant by "*A*". An appeal to the High Court therefrom was dismissed. In the patta proceedings the Assistant Settlement Officer granted patta in favour of the respondent-temple under section 9 of Act XXVI of 1963 and not to the appellant holding that section 14 could not apply. The order was confirmed by the Tribunal on appeal. The appellant preferred a further appeal to the High Court. The main contention for the appellant was that the dasi tenure was a service tenure by virtue of section 40 (2) of the H. R. & C. E. Act, 1959, that the matter can be decided only by the Collector, and the enfranchisement of the inam ought to have been made without in any way being affected by the decisions of the civil Court.

Held: The evidence on record like the Inam Fair Register and the judgments rendered by the Civil Court established that the inam grant was in favour of the temple, that the suit property was temple davadayam land and not devadasi manyam. Nor was the appellant adopted by "*A*" and she had never performed devadasi service. The question of enfranchisement under section 40 (2) of Act XXII of 1956 cannot be agitated in the light of the findings.

If there are simultaneous proceedings before the authorities constituted under the specified Act and also before the civil Court, the decision of the civil Court rendered much earlier to the decision by the authorities constituted under the specified Act in respect of jurisdictional matters will definitely bind not only the parties concerned but also the authorities under the statute concerned who have to act on such established facts.

[*Para.* 9.]

Cases referred to:

Periathambi Goundan v. *The District Revenue, Officer*, (1980) 2 M. L. J. 89 : I. L R. (1980) 2 Mad. 255 : 93 L. W. 169 : A. I. R. 1980 Mad. 180.

Appeal against the order and judgment, dated 21st March, 1977 of the Minor Inams Abolition Tribunal (V Additional Subordinate Judge) Tiruchirapalli and passed in Inams C. M. A. No. 324 of 1972, (case Nos. Trichy 349 to 360 of 1972, on the file of the Assistant Settlement Officer, Tiruchirapalli.

*S. T. A. No. 322 of 1977. *17th August,* 1982.

K. Ramamurthy, for Appellant.

Srinivasan, for Respondent.

The Order of the Court was made by

Gokulakrishnan, J.—The appellant by name Valambal claimed patta under section 14 of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963) for an extent of 31 acres 54 cents in Survey Numbers 116/2, 231/4, 149/4 and 97/2 in the village called Pettaivaithalai in Tiruchirapalli District. A few facts may be stated to understand the real crux of the matter involved in this case.

2. On 17th January, 1948, the Madras Devadasis (Prevention of Dedication) Act (Madras Act XXXI of 1947) came into force. Since then the services of Devadasis were never more required by the temples. The appellant, claiming that she is the adopted daughter of one Angamuthu who is the last service holder of the Devadasi service, wanted to get the patta in her favour. According to the appellant, her brother by name Palaniandi forcibly took possession of the property from the appellant, during 1948. The appellant filed a suit in O. S. No. 36 of 1955 on the file of the Subordinate Judge of Tiruchirapalli to recover possession from her brother Palaniandi. That suit was decreed. Even during the pendency of the said suit, the appellant was in possession of the property as a Receiver until the suit was decreed in 1957. In 1959, the respondent-temple made an application to the Hindu Religious and Charitable Endowments Board under section 87 of Act XIX of 1961 (which section corresponds to section 101 in Tamil Nadu Act XXII of 1969) for the issuance of a certificate enabling the concerned authorities to take possession of the property. That application filed before the Comissioner Hindu Religious and Charitable Endowments stood transferred to the Deputy Commissioner, Religious and Charitable Endowments, Thanjavur and was numbered as M. P. No. 1 of 1960. The Deputy Commissioner granted a certificate as prayed for in favour of the respondent-temple. Hence the appellant filed Writ Petition No. 993 of 1963 in the High Court questioning the grant of certificate in favour of the temple and that writ petition was allowed by quashing the order granting the certificate. The respondent-temple filed O. S. No. 51 of 1961 in the Subordinate Judge's Court, Tiruchirapalli for getting possession of the suit lands. It also prayed for the recovery of a sum of Rs. 19,500 towards mesne profits. The said suit was decreed for possession but the mesne profits claimed was not granted, but instead Chathurbagam amounting to Rs. 6,275 was granted. Hence the appellant herein filed A. S. No. 37 of 1965 on the file of the High Court. The temple also preferred a memorandum of cross-objections regarding the mesne profits disallowed by the trial Court and also regarding the finding that the adoption found in favour of the appellant was not correct. The High Court dismissed the appeal and allowed the memorandum of cross-objections *in toto*.

3. In the patta proceedings, the Assistant Settlement Officer granted patta to the temple under section 9 (1) of Tamil Nadu Act XXVI of 1963. The Assistant Settlement Officer also held that the facts will not attract section 14 of the said Act. Against the order of the Assistant Settlement Officer an appeal was filed to the Tribunal and the same was numbered as C. M. A. No. 324 of 1972. The Tribunal "concurred with the view of the Assistant Settlement Officer and dismissed the appeal. Hence the present appeal has been filed.

4. Mr. Ramamurthi, the learned counsel appearing for the appellant submitted that the grant of patta under scetion 9 (1) of Tamil Nadu Act XXVI of 1963 is not correct because the holding by the temple cannot be characterised as 'private' within the meaning of section 9 (1) of the Act and that the matter comes within the ambit of section 14 of the Act and the appellant is entitled to the grant of patta under section 14 of the Act. The learned conusel further submitted that the Dasi Service is a service tenure by virtue of section 40 (2) of the Hindu Religious and Charitable Endowments Act, that the matter can be decided only by the Collector for enfranchisement of the same in favour of the appellant and that, therefore, the findings given by the civil Court are not binding on the appellant. According to the learned counsel, such a finding given by the trial Court is without jurisdiction and as such it will not bind the appellant herein.

5. We have been taken through the orders of the authorities below and also the

relevant documents filed in this case. The main contention of the learned counsel appearing for the appellant is that the petition for enfranchisement of those lands is pending before the Collector and that under section 40 (2) of the Hindu Religious and Charitable Endowments Act, 1959, the enfranchisement ought to have been made in favour of the appellant in respect of the disputed lands without in any way being affected by the findings of the civil Court. Section 40 (1) (*a*) (*i*) of Act XXII of 1959 reads as follows :

"Where the remuneration for any service to be performed by a devadasi in temple consists of lands granted or continued in respect of, or annexed to, such service by the Government the Government shall enfranchise the said lands from the condition of service, by the imposition of quit-rent."

Correctly Mr. Ramamurthi submitted that this service tenure was not granted in favour of the appellant herein or in favour of her predecessors-in-interest and as such the provision under section 40 (1) (*a*) (*i*) will not apply to the facts of the case. But the learned counsel submits that section 40 (2) will be attracted on the facts and circumstances of the present case. Section 40 (2) reads as follows :

"Where the remuneration for such service consists in whole or in part, of lands or of produce of lands not falling under sub-section (1), the Government shall direct the District Collector to determine the amount of rent payable on the lands or the produce in question. The District Collector shall thereupon, after giving notice to the party concerned and holding such inquiry as may be prescribed by the Government by an order, determine the amount of rent, and in doing so, he shall have due regard to—

(*a*) the rent payable by the tenant for lands of a similar description and with similar advantages in the same village or neighbouring villages; and

(*b*) the improvements, if any, effected by the devadasi in respect of the lands.

Such order shall be communicated to the parties concerned and also published in the manner prescribed."

6. In order to appreciate the argument of the learned counsel that as per section 40 (2) enfranchisement ought to have been made only by the Collector and the civil Courts have no jurisdiction to go into the issues such as the nature of the grant, the right of the appellant as the adopted daughter of Angamuthu etc. we can usefully refer to the finding that has been arrived at before any order was passed by the Collector under section 40.

7. While dealing with the jurisdiction of a civil Court in respect of the Tamil Nadu Agricultural Land Record of Tenancy Rights Act (Act X of 1960), a Full Bench of our High Court has observed as follows in the decision reported in *Periathambi Goundan* v. *The District Revenue Officer, Coimbatore*[1].

"Consequently, the controversy as to whether a particular piece of land has been let for cultivation by a tenant or not is one constituting the jurisdictional issue which a Record Officer has to decide before he can determine any other matter under the Act. But that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act, because to hold so will enable the statutory authorities to assume jurisdiction by erroneously deciding the jurisdictional issue. If the controversy arises, the authorities functioning under the Act have necessarily to decide the same, because a decision on that controversy will determine the jurisdiction of the authorities functioning under the Act. If the decision is that the land has been let for cultivation by a tenant, then the Record Officer will have jurisdiction to determine the further particulars provided for in section 3 (2) of the Act. If on the other hand, the decision of the controversy is that the land has not been let for cultivation by a tenant there is no question of there being any tenancy rights in respect of the said land and consequently there is no question of the Record Officer

1. (1980) 93 L. W. 169 : I. L. R. (1980) 2 Mad. 255 : (1980) 2 M. L. J. 89 : A. I. R. 1980 Mad. 180.

ascertaining or determining any further particulars in this behalf. Therefore, if such controversy arises that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act. Subject to this qualification it can be held that once the Record Officer or any other authority functioning under the Act has come to the conclusion that the land has been let for cultivation by a tenant, the matters provided for in section 3 (2) have to be determined by the Record Officer, or other authority functioning under the Act, and to that extent the jurisdiction of the civil Court is barred under section 16-A of the Act."

Thus it is clear from the abovesaid decision that for the purpose of the Record Officer taking cognizance of the question of jurisdiction, though can be incidentally decided by the Record Officer, that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act.

8. The power of the civil Court to enter into this jurisdictional aspect of the case can also be spelt out from section 40 (6) of the Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959) which reads as follows :

> "No order passed under sub-section (1), (2) or (3) shall operate as a bar to the trial of any suit or issue relating to the right to enjoy the land or, assignment of land revenue or produce derived from the land, as the case may be."

In this connection, we may usefully refer to sectiou 68 (2) of the Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 (Act XXVI of 1963) which says :

> "The decision of a civil Court (not being the Court of a District Munsif or a Court of Small Causes) on any matter falling within its jurisdiction shall excempt in so far as such decision is inconsistent with the provisions of this Act be binding on the parties thereto and persons claiming under them in any proceeding under this Act before a Tribunal or Special Appellate Tribunal or a Judge of the High Court under sub-section (2) of section 46 in so far as such matter is in issue between the parties or persons aforesaid in such proceedings."

The question of validity of an adoption definitely falls within the jurisdiction of the civil Court.

9. In the light of the principles mentioned in paragraphs supra, we can now look into the facts of the present case. Mr. Ramamurthi, learned counsel appearing for the appellant fairly concedes that the grant is in favour of the temple and that his client cannot have any claim over the property if once it is decided that she is not the adopted daughter of Angamuthu. The evidence on record such as the Inam Fair Register and also the judgments rendered by the civil Court clearly establishes that the grant is in favour of the temple and it is unnecessary for us to discuss in detail with regard to this aspect of the case. The temple filed O. S. No. 51 of 1961 on the file of the Second Additional Subordinate Judge, Tiruchirapalli alleging that on the death of Angamuthu (though the appellant claims that Angamuthu is her adoptive mother) nobody performed Dasi service, that the defendant in that suit was not the adopted daughter of Angamuthu and did not perform Dasi service in the temple and that on the abolition of the performance of Dasi Service by the Madras Devadasi (Prevention of Dedication) Act. (XXXI of 1947) the service itself ceased to exist, that the defendant in that suit had no right to possession and that she should surrender possession with mesne profits for three years prior to suit or at any rate with Chaturbagam for three years at the rate of which it was being paid previously. In the judgment in A. S. No. 37 of 1966, a Bench of our High Court has clearly stated that the finding of the trial Court that the suit property belongs to the temple devadayam lands and had not been granted as Devadasi Manyam was not challenged before the Bench. The appellant was a party to the said proceedings and we are of the view that the said finding will certainly bind the appellant herein and that is the reason why Mr. Ramamurthy appearing for the appellant conceded on this aspect of the case. In that Bench decisision we can usefully refer to the following passage wherein it was found that the appellant is not the adoptive daughter of Angamuthu :

"The trial Court was considerably influenced by the fact that in the suit between the defendant and her brothers, the case of the defendant that she was the adopted daughter of Angamuthu was upheld. But the several circumstances which we have pointed above, which in our opinion, conclusively establish the falsity of the defendant's case were not placed before him, as the temple was not a party in the suit. We have already pointed out that this Court in disposing of the appeal filed by Palaniyandi, did not go into the question of truth or otherwise of the adoption set by the defendant. The documents to which we have made reference, clearly establish that the case of adoption set up by the defendant is an after thought evidently conceived only in the year 1947 when the legislation abolishing Devadasi service was in the anvil, with a view to put forward title to the suit property which was previously enjoyed by Angamuthu in lieu of remuneration for dasi service which she was rendering in the plaintiff-temple. We have no doubt in our mind that the defendant was not the adopted daughter of Angamuthu, that she never performed the Devadasi service in the plaintiff-temple and that she never occupied the suit property as a devadasi service holder."

This finding of the Bench of our High Court will, in our view, clearly bind the appellant herein and such findings on questions like adoption which will be the basis for claiming enfranchisement is a jurisdictional question as per the decision of the Full Bench rendered in *Periathambi Goundan* v. *The District Revenue Officer, Coimbatore*[1], which we have already referred to, can be gone into by the civil Court. If there are simultaneous proceedings before the authorities constituted under the Act and also before the civil Court, the decision of the civil Court rendered much earlier to the decision by the authorities constituted under a specific Act in respect of jurisdictional matter will definitely bind not only the parties concerned but also the authorities under the statute concerned who have to act on such establihsed facts. The question of enfranchisement under section 40 (2) of Act XXII of 1959 pleaded by Mr Ramamurthi cannot be agitated in the light of the finding which we have referred to above by a Bench of our High Court in A. S. No. 37 of 1965 which has preceded an enquiry under section 40 of Act XXII of 1959. It is only on this basis the authorities below have also dismissed the claim of the appellant herein. We are in complete agreement with the said finding given by the authorities below an as such the appeal is dismissed. There will be no order as to costs.

S. J. —— *Appeal dismissed.*

1. (1980) 2 M. L. J. 89 ; 93 L. W. 169. (F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:-- *S. Nainar Sundaram, J.*

Mettur Spinning Mills, Mettur Dam, Salem District, represented by Partner ... *Petitioner**

v.

The Deputy Commissioner of Labour, Coimbatore (Appellate Authority under the Payment of Gratuity Act, 1972) and others ... *Respondents.*

(A) *Payment of Gratuity Act (XLI of 1972), section 4 (1)* (b) *and 4 (6)* (b) (ii)—*Charge memo issued to permanent employee of the petitioner-Mill on 3rd October, 1975, —No suspension order—Employee's letter of resignation, dated 4th February, 1976—Petitioner refusing to accept resignation pending enquiry—Enquiry held on 24th June, 1976,—Employee applying on 2nd June, 1976, to concerned authority under the Payment of Gratuity Act—Employee dismissed on basis of enquiry findings on 8th June, 1976, by the petitioner—Gratuity ascertained after contest by the petitioner and Rs. 5,167 directed to be paid by the petitioner by order dated 30th August, 1977—Appeal against the order dismissed—Writ petition filed to quash the order.*

*W. P. No. 4770 of 1978. 31st August, 1982.

(B) *Contract of service—Resignation of post by employee—Acceptance of resignation, if necessary for its taking effect—Effect of disciplinary action taken after resignation—Claim for gratuity by employee, if tenable.*

(C) *Standing Order, Clause 13* (iv)—*Scope and construction.*

(D) *Constitution of India (1950), Article 226.*

The third respondent to the writ petition was a permanent employee of the petitioner, Mettur Spinning Mills. On 3rd October, 1975, a charge memo was issued by the latter to the employee alleging acts of misconduct on his part. No suspension order was passed. The employee offered no explanation. On 4th February, 1976, the employee-third respondent wrote to the petitioner resigning his post in conformity with clause 13 (*iv*) of the Standing Order. On 5th February, 1976, the petitioner informed the employee that his resignation cannot be considered till the charges against him were cleared. The employee wrote again letters insisting on acceptance of his resignation. He also wrote to the Labour Commissioner on 7th February, 1976, with copy to the petitioner referring to his resignation and demanding settlement of his wages, bonus and gratuity. On 24th March, 1976, enquiry into the charges was held and though the employee was present and admitted the charges he asked for the acceptance of his resignation and payment of the balance of the gratuity amounts due to him after adjustment by the petitioner of any loss occasioned by his conduct. On 3rd April, 1976 the petitioner wrote to the employee asking him to go to its office on 5th April, 1976 to get the accounts settled. The latter replied on the 6th pleading inability to go to the office due to ill-health and asking for the amounts due to him to be sent by a cheque. There being no response, the employee applied in the proper form as per the rules under the Payment of Gratuity Act, on 2nd June, 1976, in respect of his gratuity. On 8th June, based on the findings at the disciplinary enquiry the petitioner passed an order dismissing the employee from service and obtained the approval thereto of the Labour Commissioner under section 33 (2) (*b*) of the Industrial Disputes Act on 5th March, 1977. The employee's application under the Payment of Gratuity Act was, after contest by the petitioner, ordered by the second respondent on 30th August, 1977 directing the petitioner to pay Rs. 5,167.80 as gratuity. Appeal to the first respondent by the petitioner against the order was dismissed on 24th October, 1978. The present writ petition was filed challenging the order. The contention of the petitioner was that the employee-third respondent having been dismissed from service for misconduct involving moral turpitude his case fell within section 4 (6) (*b*) (*ii*) of the Act disentitling him to any gratuity. A further contention was that the resignation of the employee not having been accepted the prosecution of the disciplinary action and conduct of the enquiry on 24th March, 1976 against him culminating in his dismissal on 8th, June, 1976 were quite in order. For the employee-third respondent, it was argued that his resignation was strictly in accord with the relevant Standing Order, that it had beome effective on the lapse of 14 days from the date of the receipt of the letter by the petitioner as per the rules, that the disciplinary proceeding held thereafter was incompetent, that his dismissal as one for misconduct involving moral turpitude could not therefore arise, and that he was entitled to gratuity under section 4 (1) (*b*) of the Payment of Gratuity Act.

Held; By virtue of his resignation the 3rd respondent went out of service even before the order of dismissal passed in the disciplinary proceedings and hence the latter had no efficacy at all in the eye of law and in the context. It is not possible to invoke section 4 (6) (*b*) (*ii*) of the Payment of Gratuity Act. The matter would come squarely within section 4 (1) (*b*) of the Act. [*Para. 4.*]

It is well-settled that mere unilateral resignation is not enough both in the case of a civil servant and in the case of an ordinary master and servant governed by a contract, unless the resignation is accepted. A servant, who is bound by the agreement of service to serve till his services are put an end to, must first make an offer intimating his intention to terminate his services and that offer must be accepted. This is the primary principle governing the contract of service irrespective of the fact whether it is the case of a civil servant or even if the matter is treated as a contract between the parties. But the condition of acceptance can be

expressly or impliedly dispensed with either by the rules governing the services or by agreement between the parties. The rules or the contract will regulate the conditions for tendering of resignation as well as for its acceptance. The judicial pronouncements reiterate and delineate the proposition in law that though resignation, to take effect should normally be accepted, yet, the rules governing the services or the contract between the parties could expressly or impliedly provide otherwise. The rules or the terms of the contract of service may provide the mode in which the employee could go out of service voluntarily. If in tendering resignation or terminating the contract of service, the employee has adhered to and satisfied either the rule or the condition in the contract of service, that would suffice the matter to put an end to the services and once the services have been put an end to, it is not competent for the employer either to commence or to continue disciplinary action against the employee who has gone out of his employment. Equally so, a term in the contract of service or the rule governing the service may provide that the resignation by or the termination of services at the instance of the employee will not be effective when disciplinary proceedings have already been commenced and are pending against the employee. Again if the employee goes out of service earlier to the commencement of disciplinary proceedings such proceedings will be wholly incompetent and will be without jurisdiction. [*Paras. 6,13.*]

A bare commencement of disciplinary proceedings does not by itself inhibit the employee from terminating his services with the employer as per the condition of service under the contract or the rules governing the services, unless they provide otherwise. If there is a possibility that the employee, pending disciplinary proceedings, has been suspended according to the rules governing the services which order of suspension can be deemed to have suspended the contract of service itself, then it may not be open to the employee to unilaterally terminate his services. [*Para.* 14.]

There is only the issue of notice of charges on 3rd October, 1975. The enquiry proceedings were held on 24th March, 1976, and the findings were rendered on the same date and the order of dismissal came to be issued only on 8th June 1976. Earlier to the enquiry proceedings and the order of dismissal, the 3rd respondent has submitted his letter of resignation or termination of his services with the petitioner and it was in accordance with clause 13 (*iv*) of the Standing Orders and there is no impediment to spell out the only position that the services of the 3rd respondent with the petitioner stood terminated with the lapse of 14 days from the date of service of the letter of the 3rd respondent on the petitioner, namely on 5th February, 1976. Hence, the conduct of enquiry proceedings on 24 March, 1976, and the consequent order of dismissal on 8th June 1976 have no sanctity in the eye of law since the third respondent's services stood terminated even earlier to those dates and he had already gone out of the employment of the petitioner. [*Para.* 17]

The expression 'resignation' is not a term of art. 'To resign' means to 'relinquish' and to give up office and employment and one of the dictionary meanings of the expression 'resignation' is 'act of giving up'. Clause 13 (*iv*) of the Standing Orders appears to be the only provision by virtue of which an employee under the petitioner of his own accord can go out of employment and give up his office. Hence the process of going out of office can be equated only to resignation. The position, factual and legal, being what it is, the only conclusion that could be arrived at is that earlier to the purported termination of services of the 3rd respondent by the petitioner on 8th June 1976, the 3rd respondent had gone out of the employment of the petitioner on resignation and this would attract section 4 (1) (*b*) of the Act and thereafter, it is not possible to invoke section 4 (6) (*b*) (*ii*) of the Act, to disentitle him to gratuity. [*Paras.* 18 *and* 19.]

Cases referred to:—

Ganesh v. *C. I. P. Railway*, (1900) 2 Bom. L R. 790 ; *Sudarsana Rao* v. *Christian Pillai*, (1923) 45 M. L J. 798 ; A. I. R. 1924 Mad. 396 ; *Tiruvengadam* v. *Indian Institute of Science*, (1957) 1 Lab. L. J. 285 : A. I. R. 1954 Mys 158 ; *Harabillas* v. *Income-tax Commissioner*, A I R. 1963 Cal.359 ; *M. S. Subra-*

manlam v. *State by Union of India*, (1968) M. L J. (Crl) 1021 ; *Geadrosuia* v. *State of M. P.*, (1970) 2 S. C. J. 573 : (1970) 3 S. C. R. 448 : A. I. R. 1970 S. C. 1494.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in A. G. A. case No. 15 of 1977 on the file of the first respondent herein and quash the order passed, the order dated 24th October, 1978 confirming the order passed by the second respondent herein in case No 33 of 1976, dated 30th August, 1977 and quash the said order and made therein.

M. R. Narayanaswamy, for Petitioner.

M. A Sadanand, Government Pleader for Respondent Nos. 1 and 2.

N. G. R. Prasad for Respondent No. 3.

The Court made the following

ORDER.—The petitioner in this writ petition is Mettur Spinning Mills, Mettur Dam, Salem District. The 3rd respondent was employed under the petitioner. On 3rd October, 1975, a charge memo was issued by the petitioner to the 3rd respondent. The gravemen of the charge was that the 3rd respondent, during the period from February, 1975 to April, 1975 obtained a certificate from the doctor attached to the Employees' State Insurance Dispensary of Mettur Dam that he was sick on a number of days and he got sickness benefits from the Employees' State Insurance Corporation, and during the same period, when the petitioner mills was under lay-off, suppressing the above fact, he presented himself for work is the petitioner mills and obtained lay-off compensation. Admittedly there was no order of suspension of the 3rd respondent, pending enquiry into the above charge, passed by the petitioner. It is stated that an 10th October, 1975 the 3rd respondent wanted time to offer his explanation to the charge and he did not submit his explanation. Nothing further seemed to have been done towards the prosecution of the disciplinary action until March, 1976. On 4th February, 1976 the 3rd respondent wrote a letter to the petitioner resigning from his post. On 5th February, 1976 the petitioner informed the 3rd respondent that his resignation cannot be accepted till the pending charges are cleared. On 7th February, 1976, the respondent addressed a letter to the Labour Commissioner with a copy to the petitioner referring to his resignation and making a demand for settlement of his wages, bonus, gratuity, etc. On 11th February, 1976, the 3rd respondent addressed a letter to the Labour Commissioner with a copy to the petitioner referring to his resignation and making a demand for settlement of his wages, bonus, gratuity, etc. On 11th February, 1976, the 3rd respondent addressed, a letter to the petitioner insisting that his resignation should be accepted since he was not well and was under medical treatment, and further stating that he was not guilty of any misconduct. On 3rd March, 1976, the 3rd respondent addressed a further letter to the petitioner enquiring about the acceptance of his resignation. On 16th March, 1976, the petitioner wrote to the 3rd respondent referring to the payment of bonus for the year 1975-76 and stated that it would be kept in abeyance till the charges pending against the 3rd respondent are enquired into and orders passed thereon. On 18th March, 1976, the 3rd respondent wrote to the petitioner referring to his previous letters, complaining about the non-acceptance of his resignation, pleading his inability to continue in work and demanding acceptance of his resignation and settlement of his gratuity and bonus. On 24th March, 1976, the enquiry into the charges was conducted and the 3rd respondent was present at the enquiry and even though he admitted the charges levelled against him, he pleaded that his resignation should be accepted and the loss, if any, suffered by the petitioner can be deducted from the gratuity amounts due to him and the balance paid to him. On 3rd April, 1976, the petitioner wrote to the 3rd respondent calling upon him to come to the petitioner's office on 5th April, 1976 and to have his accounts settled. On 6th April, 1976, the 3rd respondent wrote to the petitioner stating that his health was not all right and hence the amounts due to him may be sent by cheque. Obviously, finding no response from the petitioner, the 3rd respondent prosecuted an application in Form-I as

per the relevant rule under the Payment of Gratuity Act (XXXIX of 1972), hereinafter referred to as 'the Act'. In this form, the 3rd respondent has stated in the column relating to the date and cause of termination of services, that he resigned on 4th February, 1976. The 3rd respondent followed this up by prosecuting the application dated 2nd June, 1976, in Form-N as per the relevant rule under the Act to the 2nd respondent and this application was received by the 2nd respondent on 4th June, 1976. On 8th June, 1976, the petitioner, on the basis of the finding rendered in the enquiry held on 24th March, 1976, and the report of the Enquiry Officer of even date, passed an order of dismissal of the 3rd respondent from service. On the same date, namely 8th June, 1976, the petitioner presented an application to the Labour Officer, Salem, under section 33 (2) (*b*) of the Industrial Disputes Act, 1947, for approval of the order of dismissal dated 8th June, 1976. The said Labour Officer, by order dated 3rd March, 1977, accorded approval to the action taken by the petitioner. After contest by the petitioner of the application presented by the 3rd respondent, the 2nd respondent, on an assessment of the materials placed before him, by order dated 30th August, 1977, directed the petitioner to pay the 3rd respondent a sum of Rs. 5,167-80 as gratuity under the Act. The petitioner appealed to the 1st respondent and the 1st respondent by order dated 24th October, 1978, declined to interfere in appeal and dismissed the appeal of the petitioner. The petitioner challenges the orders of respondents 1 and 2 in the present writ petition and seeks quashing of the said orders under Article 226 of the Constitution of India.

2. The learned counsel appearing for the petitioner would submit that the 3rd respondent has been dismissed from service for a misconduct which constitutes an offence involving moral turpitude in the course of his employment and hence he is not entitled for payment of gratuity under the Act and the matter would come within the mischief of section 4 (6) (*b*) (*ii*) of the Act and respondents 1 and 2 erred in countenancing the claim of the 3rd respondent for payment of gratuity Mr. N. G. R. Prasad, learned counsel appearing for the 3rd respondent, wants to sustain the award of gratuity in favour of his client by stating that the 3rd respondent resigned as early as 4th February, 1976, and this was in accordance with the concerned Standing Order, which I shall presently refer to, and the resignation became effective on the lapse of 14 days from the date of receipt of the letter of resignation, which date in the present case is 5th February, 1976, and the prosecution of disciplinary proceedings after the resignation became effective was wholly incompetent and has got to be ignored and hence it is not possible to sustain the case of the petitioner that it was a case of termination of the services of the 3rd respondent for a misconduct which involved moral turpitude. The learned counsel for the 3rd respondent did not go into the question of the character of the misconduct as to whether it involved moral turpitude or not since he wanted to sustain the award of gratuity on the ground that the respondent resigned and this would attract section 4 (1) (*b*) of the Act entitling the 3rd respondent for payment of gratuity.

3. In meeting the contentions put forth by the learned counsel for the 3rd respondent, the learned counsel for the petitioner would state that the resignation of the 3rd respondent had not been accepted and the 3rd respondent must be deemed to have continued in service and hence the prosecution of the disciplinary action, conduct of the enquiry proceedings on 24th March, 1976, and the culmination of the same in the order of dismissal on 8th June, 1976, are perfectly in order and the matter squarely comes within the ambit of section 4 (6) (*b*) (*ii*) of the Act and wants to sustain the petitioner's denial of gratuity to the 3rd respondent on the ground that his services were terminated for misconduct involving moral turpitude.

4. In my view, occasion would not arise to consider the question as to whether the misconduct for which the petitioner was visited with the order of dismissal of 8th June, 1976, involved moral turpitude or not, because I am inclined to countenance the submission made by the learned counsel for the 3rd respondent that by the resignation, the 3rd respondent went out of service even before the order of dismissal passed in disciplinary action and hence the letter has

no efficacy at all in the eye of law and in the said context, it is not possible to invoke section 4 (6) *(b)* *(ii)* of the Act and the matter would come squarely within section 4 (1) (*b*) of the Act.

5. Before the matter is proceeded with it becomes incumbent to advert to the relevant provisions of the Act and theclause in the Standing Orders which governs the service conditions in the petitioner-mills. Section 4 (1) (*b*) contemplates payment of gratuity on retirement of an employee or his resignation and it reads as follows :—

> "Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years.
>
> (b) on his retirement or resignation...".

6. Section 4 (6) sets out exceptions to the payment of gratuity and it is open to the employer to withhold the payment of gratuity to the employee if the conditions set out in clauses (*a*) and (*b*) are satisfied. In those contingencies, the employee forfeits the gratuity normally payable to him. In the present case, the petitioner wants to deny the 3rd respondent gratuity, bringtng the case within the ambit of section 4 (6) (*b*) (*ii*). The said provision reads as follows:

> "Any permanent worker desirous of leaving the service shall give fourteen day's notice to the head of the department concerned. The wages due to such a workman, must, if possible, be paid on the day the notice expires and in any case within the two days after the expiry of the notice."

7. It is not disputed before me that the letter of the 3rd respondent who was a permanent employee dated 4th February, 1975, was one given by him under the aforesaid clause. It is true that the expression used is 'resignation or razinsma'. No issue has been raised before me on the ground that on account of the user of the aforesaid expression, the letter of the 3rd respondent dated 4th February, 1976, could not be said to be one issued under clause 13 (*iv*) of the Standing Orders. Hence we can take it that the 3rd respondent chose to terminate his services pursuant to clause 13 (*iv*) of the Standing Orders. It is well settled that mere unilalteral resignation is not enough both in the case of a civil servant and in the case of an on ordinary master and servant governed by a contract' unless the resignation is accepted. A servant, who is bound by the agreement of service to serve till his services are put an end to, must first make an offer intimating his intention to terminate his services and that offer must be accepted. This is the primarp principle governing the contract of service irrespective of the fact whether it is the case of a civil servant or even if the matter is treated as a contract between the parties. But the condition of acceptance can be expressly or impliedly dispensed with either by the rules governing the services or by agreement between the parties. The rules or the contract will regulate the conditions for tendering of resigaation as well as for its acceptance.

7. The classical judgment that is oft-quoted in the subsequent judicial pronouncements and by well-known authors dwelling upon the subject of contract of service and termination thereof, is that of Jenkins, C.J., pronounced in *Ganesh* v. *C. I. P. Railway*[1], and the learned Chief Justice succinctly set out the proposition in the following terms :

> "Now a contract of service is continuing in its nature, and its continuance and the obligations under it can only be determined in certain defined modes. Here resignation obviously is not enough unless it be assented to, or unless it comply with those terms which the law implies or the prior agreement of the parties may permit."

8. Ramesam, J. in *Sudarsana Rao* v. *Christian Pillai*[2], stated that without acceptance, resignation amounts to nothing and the person resigning remains in office and to resign is not a matter of right and it is a question of fact in each case whether the resignation amounted to a renunciation without acceptance. It is obvious that the learned Judge has not lost sight of the contract of service or the rules providing otherwise for the resignation to make effect without acceptance.

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1. (1900) 2 Bom. L. R. 790.
2. (1923) 45 M. L. J. 798 : A. I. R. 1924 Mad. 396.

A Division Bench of the High Court, Mysore, in *Tiruvengadam* v. *Indian Institute of Science and others*[1], considered a clause in the agreement of service which read as follows:—

> "That the employee maylikewise terminate the contract of service by giving the Director as the Chief Executive six months' notice is writing of his intention of doing so".

9. The Division Bench found that the provision as to notice by the employee did not, as a matter of fact, provide for any acceptance and an acceptance of a resignation in much circumtances is not always necessary or required in law. The learned Judges referred to the dictum of, Jenkins, C. J. and took note of the proposition that the terms of the contract of service may permit resignation to take effect without formal acceptance.

10. Jagadisan, J. in *Francis* v. *The General Manager, Southern Railway and others*[2], considered the case of an employee of the Railway and there was a service agreement as well as rules of the Indian Railway Establishment Code relating to termination of service and resignations.

The learned Judge also took note of the dictum of Jenkins, CJ. that the prior agreement between the parties may permit a valid termination without the assent of the employer and the learned Judge, construing the provisions of the service agreement and the rules of service, found that the notice given by the employee effectively terminated his services and further found that the embargo under rule 150 of the Code with reference to acceptance of resignation of a railway servant, whose conduct was under investigation, could not be availed of by the Railway to nullify the effect of termination of the employment because disciplinary proceedings had not commenced before such termination and they commenced only subsequently.

11. In *Harabillas* v. *Income-tax Commissioner*[3]. Banerjee, J. considered the scope of rule V of the Central Services (Temporary Service) Rules, 1945 which provided for the service of a temporary Government servant getting termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant and the period of such notice was stipulated to be one month unless otherwise agreed to by the Government or by the Government servant. The learned Judge, of course on facts found that the letter of resignation given by the employee did not satisfy the above rule as contended by the Department, but did countenance the proposition of law that the right to proceed against an employee departmentally subsists so long as there remains the relationship of master and servant between the employer and the employee and as soon as that relationship comes to an end, the employer or the appointing authority can no longer punish an employee departmentally.

12. Venkataraman J. in *M. S. Subramaniam* v. *State by Union of India*[1], dealt with a case where the employee, when he was faced with a criminal prosecution for offences under the Prevention of Corruption Act after he tendered his resignation, wanted to stultify the criminal proceedings by putting forth the plea that the Government had not accepted his resignation on the date when the charge—sheet was laid against him and hence he must be deemed to have been in service and the prosecution, without sanction, was incompetent. The rule dealt with by the learned Judge was similar to the one dealt with by Banerjee J., in the above Calcutta case, and the learned Judge held that the sale is complete and that either the Government may terminate the services of the employee after a month's notice or the Government servant may terminate the employment after giving a month's time and nothing more is required.

13. The above judicial pronouncements reiterate and delimit the proposition in law that though resignation, to take effect should normally be accepted, yet, the rules governing the services or the contract between the parties could expressly or impliedly

1. (1957) I L L. J. 285 : A. I. R. 1954 Mys. 158 at 159.
2. W. P. No. 523 of 1951 order dated 25th September. 1961.
3. A. I.R 1966 Cal. 359.

1. (1968) M. L. J. (Crl.) 102.

provide otherwise. The rule or the term of the contract of service may provide the mode in which the employee could go out of service and there cannot be any insistence of the formality of acceptance of the resignation or of the employee going out of service voluntarily. If in tendering resignation or terminating the contract of service, the employee has adhered to and satisfied either the rule or the condition in the contract of service, that would suffice the matter to put an end to the services and once the services have been put an end to, it is not competent for the employer either to commence or to continue disciplinary action against the employee who has gone out of his employment. Equally so, a term in the contract of service or the rule governing the services may provide that the resignation by or the termination of services at the instance of the employee will not be effective when disciplinary proceedings have already commenced and are pending against the employee as contemplated in the rules dealt with by Jagadisan, J. in *Francis* v. *The General Manager, Southern Railway & others*[1], order dated 25th September, 1961. There again, if the employee goes out of service earlier to the commencement of disciplinary proceedings, such proceedings will be wholly incompetent and will be without jurisdiction.

14. The learned counsel, for the petitioner made strenuous endeavours to sustain the proposition that from clause 13 (*iv*) of the standing orders an implied term requiring acceptance of the resignation must be spelt out. This is a futile endeavour and a reading of the clause extracted above, does not permit this. Realising this hurdle, the learned counsel for the petitioner projected a further proposition that the disciplinary proceedings having been commenced by the issue of notice of charges even on 3rd October, 1975, it is not open to the 3rd respondent to go out of service by addressing a letter of termination or resignation on 4th February, 1976. This again is a misconception. A bare commencement of disciplinary proceedings does not by itself inhibit the employee from terminating his services with the employer as per the conditions of service under the contract or the rules governing the services, unless they provide otherwise. If there is a possibility that the employee, pending disciplinary proceedings, has been suspended according to the rules governing the services, which order of suspension can be deemed to have suspended the contract of service itself, then it may not be open to the employee to unilaterally terminate his services.

15. In *Gladrosiva* v. *State of Madhya Pradesh*[1], the Supreme Court discussed the legal position as regards the right to place servants under suspension with reference to its earlier pronouncements and found that rules in that case did not provide for suspension during the pendency of an enquiry and held that the order of suspension in that case could not be considered as an order suspending the contract of service and hence the contract of service was in force and it was open to the servant to put an end to the same.

16. In the present case, there is no order of suspension so as to consider the question as to whether such an order of suspension was in conformity with any rule governing the service conditions so that it can be stated that the order of suspension suspended the contract of service and the 3rd respondent could not unilaterally terminate his services with the petitioner. Here we have only the issue or notice of charges on 3rd October, 1975. The enquiry proceedings were held on 24th March, 1976, and the findings were rendered on the same date and the order of dismissal came to be issued only on 8th June, 1976. Earlier to the enquiry proceedings and the order of dismissal, the 3rd respondent had submitted his letter of resignation or termination of his services with the petitioner and it was in accordance with clause 13 (*iv*) of the Standing Orders and there is no impediment to spell out the only position that the services of the 3rd respondent with the petitioner stood terminated with the lapse of 14 days from the date of service of the letter of the 3rd respondent on the petitioner, namely on 5th February, 1976. Hence, the conduct of enquiry proceedings on 24th March 1976 and the consequential order of dismissal on 8th June, 1976 have no sanctity in the eye of law since the 3rd respondent's services stood terminated even earlier to those dates and he had already gone out of the employment of the petitioner.

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1. W. P. No. 523 of 1961

1. (1970) 2 S. C. J. 573 : (1970) 3 S. C. R. 448 ; A. I. R. 1970 S. C. 1494.

It is significant to note that the 3rd respondent had gone before the 2nd respondent claiming gratuity under the Act even on 2nd June, 1976 and that was also earlier to the order of dismissal dated 8th June, 1976. I feel obliged to state that in *Gindroniya's case*[1] the Supreme Court dealt with a rule which in tenor is similar to clause 13 (*iv*) of the present Standing Orders and the Supreme Court pointed out that the servant by giving notice in accordance with the rule, has unequivocally informed the Government that he has terminated the services with the Government and that put an end to the services and therefore, it was not open to the Government to take any disciplinary proceeding against him thereafter.

17. The expression 'resignation' is not a term of art. 'To resign' means 'to relinquish' and 'to give up office and employment' and one of the dictionary meanings of the exqression 'resignation' 'is act of giving up'. Clause 13 (*iv*) of the Standing Orders appears to be the only provision by virtue of which an employee under the petitioner of his own accord can go out of employment and give up his office. Hence the process of going out of office can be equated only to resignation. We are not facing two sets of rules, one providing for termination of services and another providing for resignation as in the case dealt with by Jagadisan, J., in *Francis* v. *The General Manager, Southern Railway and others*[2] The 3rd respondent, by writing the letter on 4th February, 1976, obviously under clause 13 (*iv*) of the Standing Orders, has gone out of office which was, in fact, nothing but a resignation.

18. The position, factual and legal, being what it is, the only conclusion I could arrive at is that earlier to the purported termination of services of the 3rd respondent by the petitioner on 8th June, 1976, the 3rd respondent had gone out of the employment of the petitioner on resignation and this would attract section 4 (1) (*b*) of the Act and thereafter, it is not possible to invoke section 4 (6) (*b*) (*ii*) of the Act.

19. In this view, I am not able to persuade myself to interfere in writ proceedings and accordingly, the writ petition is dismissed. No costs.

R. S. —— *Petition dismissed.*

1. (1970) 2 S. C. J. 573 : A. I. R. 1970 S. C. 1494.
2. W. P. No. 523 of 1961, order dated 25th September, 1961.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*T. Sathiadev, J.*

Elgi Equipments Limited, India House, Tiruchi Road, Coimbatore-18.

... *Petitioner**

v.

The Regional Director, Regional Office Tamil Nadu Employees' State Insurance Corporation, 25, Stirling Road, Madras-600034.

... *Respondent.*

Employee's State Insurance Act (XXXIV of 1948), section 85 (8)—Contributions payable by company—Delay in some months in remitting due to stamps not being available in State Bank of India—Challan prepared and submitted on due dates—Alteration of dates by the Bank to correspond with the dates when stamps were actually available—Demand made by Regional Director and representations by company of true position as due to unavailability of stamps with the Bank—Neverthless impugned order passed—Cryptic findings given with no reason whatsoever—Order set aside and remitted for fresh disposal.

The petitioner, a company was remitting regularly contributions payable under the Employees' State Insurance Act but in certain months though challans were prepared and submitted on the due dates, the State Bank had altered the dates to correspond with the dates when alone the requisite stamps were available with the Bank. Treating these as cases of delay in remitting, the Regional Director made demands and, ignoring the replies sent by the petitioner, passed the impugned order in a cryptic form with no reasons given, assessing the damages payable for each month of delay. On a writ petition by the petitioner,

Held : The power exercised by the statutory authority is a quasi-judicial power and the

*W. P. No. 1251 of 1979. 13*th October*, 1982.

order should disclose reasons. Making a statement repeatedly without indicating in the order that the authority has understood the points involved and on what ground the contentions raised by the affected party cannot be accepted amounts to a patent error apparent on the face of the record.

[*Paras. 4. and 5.*]

The order impugned does not give any reason except a blunt finding. Cryptic orders of this nature cripples the affected party by non-application of the mind to the magnitude of the problems involved. Affected citizens are thereby compelled to undergo the process for no fault of theirs.

[*Para.* 7.]

While imposing damages there cannot be a rough and ready method adopted, more so when the affected party had come forward to put forth his representations relating to certain relevant factors. The Supreme Court has stated in *Organo Chemicals Industries* v. *Union of India*, (1979) 4 S. C. C. 573: A. I. R. 1979 S. C. 1803. referring to the expression "as it may think fit" that it shows that the authority is required to apply its mind to the facts and circumstances of the case while imposing damages. It is the duty of the authority concerned to analyse the relevant circumstances to justify the percentage of damages imposed. On the plea that due to the non-availability of stamps prompt compliance could not be made, the authority had shut his eyes and when such circumstances existed which were not within the control of the affected party no damages could have been imposed. Hence, the imposition of damages wherever stamps were not available was only due to a failure to take into account relevant facts and circumstances, which is one of its ordinary duties to be discharged. The documents produced by the company were not considered while passing the order. The notice issued does not disclose the percentage of damages proposed and the final order is not accompanied by statement as to how the damages had been worked out. If the percentage proposed is not disclosed, it disables the affected party to know the extent of penalty proposed to be levied, and to effectively make representations. Any demand made, unless it clearly spells out the percentage only misguides parties. Equally in the final order unless the percentage is disclosed, as had happened in this case, the affected party has to surmise by permutations and combinations as to how the total damages could have been arrived at. A personal hearing, cannot be made a farcical one, when the proviso to section 85 (*i*) of the Employees' State Insurance Act specifically provides that the employer shall be given a reasonable opportunity of being heard.

[*Paras.* 8, 9, 12 *and* 13.]

While assessing damages to be imposed, reasons must be given as to what factors have been taken into account for arriving at different percentages of damages; an inflexible application of a rigid formula as adopted in the impugned order and the like, must be avoided. Merely because a maximum is prescribed, it does not mean that under any circumstances some arbitrary percentage could be worked out for imposing damages as if concession had been extended. Damages imposed serve both as a penalty for breach of the statutory obligation and to achieve the object of providing compensation for the employees. Therefore imposition of damages, must be based on relevant facts and circumstances, which should be referred to in the order. [*Para.* 15.]

Case referred to:—

Organo Chemical Industries v. *Union of India*, 1979 Lab. I. C. 1261 : (1979) 4 S. C. C. 573 : A. I. R. 1979 S. C. 1803.

Petition under Article 226 of the Constitution of India. praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in proceedings No. TN/INs. I/51 - 14260-62 and dated nil November, 1978 issued by Respondent herein and quash the same.

S Jayaraman, for Petitioner.

Miss Radha Srinivasan, Additional Central Government Standing Counsel, for Respondent.

The Court made the following

ORDER. —The petitioner company is covered by the provisions of the Employees' State

Insurance Act, 1948. It is pleaded that it has been regularly remitting the contributions payable under the Act, both employer's as well as the employees'. contributions. While so, in the months of September, 1975, November, 1975, January, 1976, March, 1976, May, 1976, September, 1976 and September, 1977, since stamps were not available in the State Bank of India, even though challans had been prepared and submitted on due dates, the Bank itself had altered the dates in the challans to correspond with the dates when the stamps were actually available, and hence the delay occasioned was beyond its control. When a demand was made by the respondent, the petitioner made representations on 31st August, 1978, also thereafter brought to its notice about the non-availability of stamps, which alone precluded it from complying with the provisions of the Act. In spite of the representations made, the impugned order having been passed with a cryptic finding and with no reason whatsoever, this writ petition came to be filed.

2. Learned counsel for the petitioner, refers to the relevant correspondence which begins with the letter dated 11th March, 1976, addressed by the petitioner to the respondent stating that the stamps were not available in the months of February, 1976. The said letter refers to the return of the cheque sent by the petitioner bearing No. 72.560 dated 18th February, 1976, for Rs. 10,290.75 being the contribution for January, 1976, and also the chalan by the bank saying that it has not received the stamps for the value of Rs. 8.25. Similarly, another cheque bearing No. 678668 dated 21st June, 1976, for Rs. 9,606.45 being the contribution for the month of May, 1976, was also returned by the State Bank of India on the ground of non-availability of stamps, which the petitioner intimated by letter dated 7th July, 1976. Hence, the petitioner sought the advice of the respondent as to what should be done because of non-availability of stamps. The said two letters were replied on 17th July, 1976, by respondent stating that he had requested State Bank of India, Madras Main Branch to divert 200 sheets of Rs. 8.25 stamps to its Coimbatore Branch. Therefore, when the delay was due to non-availability of stamps, which resulted in delay in the remittances, there could not be a delay attributed to the petitioner. In spite of these clarifications the respondent had sent a letter dated 15th July, 1978, demanding Rs. 403.45 towards interest for the delay in the submission of contribution cards. This was replied by letter dated 31st August, 1978, again reiterating that non-availability of stamps was the cause for the delay in submission of contribution cards. Again, respondent sent a letter dated 23rd August, 1978, proposing to recover damages, as listed in the statement appended therein under section 85 (B) of the Act. It was claimed herein that delay had been committed in respect of cards for the months of September, 1975; November, 1975, January, March, May September, 1976 and September, 1977. A reply was sent on 9th September, 1978, repeating what had been earlier represented and narrating the circumstances, which were beyond its control. In almost all cases excepting in one or two, payments had been made on time but the Bank declined to receive the money either because of shortage of or non-availability of stamps. In spite of the representations, the impugned order was passed determining damages for all the months as proposed, even though in the earlier part of the order it has been stated that for September, 1977, the proposal to impose damages is dropped. Hence it is contended that the order is illegal on several grounds.

3. Miss Radha Srinivasan, learned counsel for the respondent, sumbits that, as for non-availability of stamps, a certificate from the Bank could have been produced and in its absence, the authority had to proceed on the prasumption that such stamps were available on time. As for the plea that the order is laconic and does not disclose any application of mind to the representations made, she would state that, there is always a presumptionthat in passing such orders, the authority takes into account the representations received and passes order only after applieation of mind, and hence, it cannot be assailed on the ground that is it a non-speaking order. About inclusion of September, 1977, she would state that if the break-up calculation is looked at, damages for the month had been excluded.

4. The foremost point that calls for consideration is, whether the respondent can pass a laconic order or is bound to give reasons.

5. Section 85 (B) of Act XXXIV of 1948, is akin to the requirements in section 14-B of the Employees' Provident Funds and Miscellanous Provisions Act. In dealing with the scope of that section in *Organo Chemical Industries* v. *Union of India*[1], it has been held that the power exercised by the statutory authority is a quasi judicial power and that the order should disclose the reasons. In para. 8 therein it is stated as follows:—.

"......... It is, in my view, an imperative of section 14-B that the Commissioner shall give reasons for his order imposing damages on an employer. The constitutionality of the power, tested on the anvil of Articles 14 and 19, necessitates this prescription. Such a guarantee ensures rational action by the officer, because reasons imply relevant reasons, not capricious ink and the need for cogency rivets the officer's mind to the pertinant material on record. Moreover, once reasons are set down, the order readily exposes itself to the writ jurisdiction of the Court under Article 226 so that perversity, illiteracy, extraneous influence *malafides* and other blatant infirmitier might get caught and be corrected. Thus, viewing the situation from the conspectus of requirements and remedies, statutory agencies may be inhibited and the scare of arbitrary behaviour allayed once reasons are required to be given."

Again in para. 38, it is stated

"........ Having regard to the punitive nature of the power exercisable under section 14-B and the consequence that ensure therefrom an order under section 14-B must be a 'speaking order' containing the reasons in support of it..............."

In the impugned order which is in a printed form leaving certain blanks to be filled up, after summarising two of the grounds taken by the petitioner, it is stated as follows:

"I have applied my mind to all the relevant facts and have gone into the reasons stated by the employer. My findings are as follows :—

However, this being the first notice to mitigate the hardship to the employer, 25 per cent of the damages proposed is levied."

Summarising the points taken by the petitioner does not mean that there was application of mind by the respondent. The claim is that the respondent had applied his mind. Making such a statement repeatedly without indicating in the order that he has understood the points involved and on what grounds the contentions taken cannot be accepted the respondent has committed a patent error apparent on the face of the order.

6. In each case, when the facts involved are different and the pleas raised are varied, to adopt a stereotyped form in every order claiming that the respondent had applied his mind, would not be a satisfactory compliance of the essential requirements expected of him to be dutifully followed under the provisions of the Act. To-day, along with this writ petition, nearly 15 writ petitions have come up, and in all these petitions, he had repeated the same words and imposed the same percentage of damages even though facts are widely varied; This is indicative of the uncared for manner of disposal reported to by the respondent in all these matters. It is also quite revealing that respondent had adopted a short-cut method of imposing a lesser percentage of damages without reference to the pleas raised by the respective petitioners.

7. The order does not give any reason except a blunt finding. It has been repeatedly pointed out by this Court and the Supreme Court, that cryptic orders of the nature cripples affected party by non-application of the mind to the magnitude of the problems involved. Affected citizens are thereby compelled to undergo this process on cover for no fault of theirs. It is for avoiding such situation, cost is awarded in such matters.

8. While imposing damages, there cannot be a rough and ready method adopted, more so when the affected party had come forward to put forth his representations relating to certain relevant factors. In the decision above, referred to, the Supreme Court has laid down that the expressions "as it may think fit" shows that the authority is required to apply its mind to the facts and circumstances of the case while imposing damages. Hence, the respondent is duty bound to analyse relevant circumstances to justify the percent

1. 1979 Lab. I. C. 1261 : (1979) 4 S. C. C. 573: A. I. R. 1979 S. C. 1803.

age of damages imposed. Therefore, the plea raised in the counter that when there has been reduction of 75 per cent. it proves the application of mind is by itself destructive, when it had applied the same percentage in all the cases that have come up before Court to-day, irrespective of different facts and circumstances pleaded by the respective petitioners. There being arbitrariness writ large in the approach made, this is again another error apparent on the face of the order. Therefore, the failure to give reasons and the adoption of a fixed percentage in almost all these cases, had brought forth arbitrary orders being passed, contrary to the requirements of the Act.

9. On the plea made that due to non-availability of stamps, prompt compliance could not be made, the respondent has shut his eyes to his own communication, dated 17th July, 1976, which shows that stamps were not available in Coimbatore Branch of State Bank of India. When such circumstances existed, which was not within the control of the affected party, no damages could have been imposed. Respondent in respect of September, 1977 had dropped the proposal to impose damages. Hence, the imposition of damages wherever stamps were not available was only due to a failure to take into account relevant facts and circumstances, which is one of its ordinary duties to be discharged as pointed out in para. 39 in A. I. R. 1979 S. C. 1803, above referred to. Since the matter is being remitted for fresh disposal, this aspect should receive pointed attention of the respondent, who will have to dispose of the matter on merits.

10. Another error pointed out by petitioner is that, even though, in the earlier part of the order respondent had stated that the proposal for imposing damages for September, 1977 was dropped, in the concluding paragraph, the said month is again included. The order does not disclose the break up figures as to how the damages had been arrived at. Learned counsel for the respondent contends that the damages imposed does not include the damages for September, 1977 and that slip has occasioned in including the month. She states that if the break-up figures are looked at, it will show that no damages had been calculated for that month. The order copy does not disclose the break-up figures for the petitioner to know whether it has been included or deleted. Even in the counter-affidavit there is no indication to this effect. It is now for the respondent to furnish the break-up figures while imposing damages and avoid such errors while passing orders. From what respondent's counsel had stated, it appears that no damages has been imposed for the said month, but the manner in which the mistake has crept in it, is a clear pointer that the respondent has not applied his mind to any portion of the order which he has signed.

11. Yet another aspect which has come up for consideration is about the claim made that certain documents have been produced but not considered. There is nothing in the order to indicate as to what are the documents which have been perused by the respondent at the time of personal hearing and which have been taken into account while passing the order and which of those he had rejected as irrelevant. In more than one matter, counsel who have appeared before the authority, had stated that, when the files are produced, the respondent looks into some of them and returns the entire file, and thereafter passed orders to the detriment of the parties. When respondent is enjoined to hold a hearing, it would be in his interest to refer to the documents placed before him and record such oral evidence as may be let in. Unless respondent indexes the documents produced before him he will be placed in a predicament, when affected parties plead that they have pleaded to the files which are produced before this Court. Whenever a personal hearing is extended, in the order at the end of it, a list of witnesses examined and the documents filed, will have to be indexed. Then alone, the claims made subsequently in Court, that several documents have been produced but not considered; could be repelled by the counsel, who appears on behalf of the respondent. In the instant matter, in the typed set of papers, certain communications which have been adverted to are relied upon. It is not clear as to whether

the said documents were before the respondent at the time of passing the order or not. Hence, to avoid this predicament, respondent will have to evolve a procedure by which the documents filed and looked at by him at the time of the hearing, should be received and marked in the proceedings. For purposes of convenience, even if the originals are to be returned, xerox copies of these documents should be retained. Since no appeal is provided against such orders, they are challenged by invoking Article 226 of the Constitution. Even to defend the said proceedings, the respondent would be handicapped, if the documents which have been placed at the time of personal hearing are not available for preparing counter-affidavit when certain points are taken relying on such documents. Hence, a procedure will have to be evolved for receiving the documents relied upon and indexing them as part of the order, along with the names of the witnesses examined.

12. The notice issued does not disclose the percentage of damages proposed. Equally, the final order is not accompanied by a statement as to how the damages had been worked out If the percentage proposed is not disclosed, it disables the affected party to know the extent of penalty proposed to be levied, and to effectively make representations. Any demand made, unless it clearly spells out percentage only misguides parties. Equally, in the final order unless the percentages are disclosed, as had happened in this case, the affected party has to surmise by permutations and combinations on how the total damages could have been arrived at. For periods for which plausible and reasonable explanations have been given, whether they have found acceptance or not, could be made out, only if a break-up statement is furnished, with percentage of damages imposed. This aspect must be followed to avoid orders being remitted on such omissions, which invite a plea being raised that inspite of valid particulars furnished they have not been considered by the authority.

13. In holding a personal hearing it cannot be made a farcical one, when proviso to section 85 (1) specifically provides that the employer shall be given a reasonable opportunity of being heard. It is claimed by several counsel, that, even if several files are produced, they are not looked into and there is no inclination on the part of the respondent to receive oral evidence. The orders which have come before Court to a great extent strengthen this claim, when in none of the orders any specific document had been referred to or oral evidence recorded. Holding of a quasi-judicial enquiry should enable parties to the proceeding to adduce oral and documentary evidence, and under no circumstances, it should be avoided. If an authority avoids evidence being let in, by such a refusal he brings about not only an illegal order, but also delays the realisation of the amounts by way of damages.

14. In the printed form, a column is meant for listing the grounds. All the points taken in the representations will have to be formulated as grounds. In spite of several points taken, in most of these orders, only one or two grounds have been catalogued, leaving aside even important points : One of the cardinal duties in holding a quasi-judicial enquiry is to frame the points for consideration and give reasons for each one of the findings arrived at. It is only when reasons are disclosed, as stated by the Supreme Court, it will show whether the order passed has been vitiated by perversity, illiteracy extraneous influence, *mala fides* or any other patent infirmities, so that they may straightway get caught and be corrected.

15. While assessing damages to be imposed, reasons must be given as to what factors have been taken into account for arriving at different percentages of damages, and inflexible application of a rigid formula, as adopted in this order and the like, must be avoided. Merely because a maximum is prescribed, it does not mean that under any circumstances some arbitrary percentage could be worked out for imposing damages as if concession had been extended. Damages imposed serve both as a penalty for breach of the statutory obligation and achieve the object of providing compensation for the employees. Therefore, the imposition of damages, must be based on relevant facts and circumstances, which should be referred to in the order.

16. In certain counter-affidavits, a stand is taken that an appeal lies under section 75. If so, in such of these matters, at the end of the order, an indication should be made, as a foot note, as to whether an appeal lies, and within what time it is to be preferred.

17. Since the matter is remitted for fresh disposal, in the light of what has been stated above, it is open to the petitioner to adduce such further oral and documentary evidence as it may consider necessary.

18. Apart from the points dealt with, petitioner has also taken other points, inclusive of the jurisdiction of the respondent to pass the impugned order. Now that the matter is remitted for fresh disposal the right of the petitioner to agitate other points is hereby preserved to be argued as and when circumstances may warrant.

19. Hence, for the reasons above stated, the impugned order is set aside and remitted for fresh disposal, resulting in the writ petition being allowed with costs Advocate's fee Rs. 250.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Mohan, J.*

N. Viswanathan, represented by Power Agent, K. Naganathan ... *Petitioner**

v.

Authorised Officer, Land Reforms, Mayavaram ... *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), sections 18 (1) and 50 (3) (c) (ii) and rule 45 (1) of Tamil Nadu Land Reforms Rules (1962)—Notification under section 18 (1), with regard to acquisition of surplus lands of the petitioners', holding, published—Compensation fixed for such surplus lands under rule 45 (1)—Draft assessment roll published in the gazette on 21st November, 1979 – Petitioner filed objections on 4th February, 1980 —Proceedings rejecting objections as time-barred on 21st February, 1980—Petition filed on 22nd February, 1980, for reconsideration also rejected—Appeal to the Land Tribunal also dismissed—Revision against order of Tribunal.

Held: A notification under section 18 (1) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land). Act was made in regard to the acquisition of the surplus lands in the holding of the petitioners and published. Subsequently the Authorised Officer made an order under rule 45 (1) of the Tamil Nadu Land Reforms Rules, 1962, fixing the compensation payable for the surplus land. The draft assessment roll was published in the Gazette on 21st November, 1979, in accordance with section 50 (3) (*a*) of the Act, clause (*ii*) of which provides for notice stating that objections, if any, in respect of any entry in the draft may be preferred by any person within 30 days of the publication. The petitioner filed objections on 4th February, 1980, which were rejected by the Authorised Officer as time-barred on 21st February, 1980. On 22nd February, 1980, the petitioner by petition sought reconsideration of the order. The

*C. R. P. No. 3476 of 1981, 7th October, 1982.

petition was rejected on 3rd March, 1980. An appeal therefrom to the Land Tribunal was also dismissed. On revision to the High Court.

Held: Under sub-section (3) (*a*) (*ii*) of section 50, objections in respect of any entry in the draft may be preferred by any person within 30 days from the date of publication, which publication is in the Official Gazette. Merely because the Legislature has used the expression "by any person", the said expression cannot be taken to mean that the persons whose names appear in the draft assessment roll stand excluded from the purview of the provisions. On the contrary the expression "any person" is comprehensive enough to take within itself the persons whose names appear in the draft as well. Again there is no justification for holding that the time for filing objections in accordance with sub-section (3) (*a*) (*ii*) of section 50 can be extended as within 30 days from the date of service of the notice. If it were to be held so, the Court will be legislating instead of interpreting the provision. That certainly is not the function of the Court.

Where the Act is unambiguous in its terms, the Court cannot in the guise of interpretation add something to the legislation. In other words, any such limitation with regard to preferring of any objection is found in sub-section (3) (*a*) (*ii*) of section 50, namely, 30 days from the date of publication. Form No. 24, is a statutory form and it leaves no room for doubt as to the point of limitation. It is the legislature that must come to the rescue of persons like the petitioners who re vitally affected by such draft notification, because their rights are in serious jeopardy.
[*Paras*. 5, 6, 7 8, *and* 9.]

Petition under section 83 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (XVIII of 1961) praying the High Court to revise the order of the Court Land Tribunal (District Revenue Officer), Thanjavur, dated 1st November, 1980, and made in L. T. C. M.A. No. 85 of 1980 (M. R. I. 457 17-70 Authorised Officer, Land Reforms (Mayavaram).

B. Kumar, for Petitioner.

G. Jermiah, for Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—The revision petitioner is a person affected by the provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, hereinafter referred to as the Act. The Authorised Officer initiated action under the Act. A notification under section 18 (1) was made with regard to acquisition of surplus land forming part of the petitioners' holding. The said notification was published on 20th June, 1979. In pursuance of the notification, under rule 45 (1) of the Tamil Nadu Land Reforms etc, Rules, 1962, an order was passed fixing the compensation payable for the surplus land declared from the holding of the revision petitioner. This was done by the Authorised Officer as per his proceedings dated 10th September, 1979. The draft assessment roll was published in the Tamil Nadu Government Gazette on 21st November, 1979, in accordance with section 50 (3) (*a*) of the Act. That provision having a bearing on the question to be decided may be extracted at this stage:

> "50 (3) (*a*). The Authorised Officer shall determine the amount at the rate specified in Schedule III, and prepare a draft assessment roll in such manner and containing such particulars as may be prescribed. He shall cause it to be published together with—
>
> (i) a statement that the amount specified therein is the entire amount payable for all interests in the land and that subject to the other provisions of this Act, the persons named therein are the only persons who are entitled thereto in the proportion stated therein; and
>
> (ii) a notice stating that objections if, any, in respect of any entry in the draft may be preferred by any person in such manner as may be prescribed within thirty days from the date of the publication.
>
> (*b*) The Authorised Officer shall cause to be served on the persons whose names appear in the draft aforesaid a copy of the draft together with a copy of the said statement and of the said notice".

The revision petitioner filed his objections on 4th February, 1980 The same was

received by the Authorised Officer on 5th February, 1980, and by his proceedings, dated 13th February, 1980, he rejected the same, being time-barred. since they were filed beyond 30 days from the date of publication, namely, 21st November, 1979. The revision petitioner once again preferred an objection petition on 22nd February, 1980, requesting reconsideration of his objection. The said petition was also rejected as belated and not maintainable. Accordingly an endorsement was made by the authorised officer on 3rd March, 1980. Thereupon an appeal was preferred to the Land Tribunal, the District Revenue Officer, Thanjavur. By his order, dated 1st November, 1980 in L. T. C. M A. No. 85 of 1980, the District Revenue Officer dismissed the appeal, upholding the finding of the Authorised Officer that the bar of limitation would operate against the petitioner, It is to revise the concurrent orders of the authorities below that the present revision petition has been filed.

3. The point that is urged before me is that under sub-section 3 (*a*) (*ii*) of section 50 of the Act, the objections will have to be filed by any person within thirty days from the date of publication, but that sub-section would not apply to a person like the petitioner whose names appear in the draft assessment roll. It is also contended that under clause (*b*) of sub-section (3) of section 50, the authorised officer is required to serve a copy of the draft with a copy of the statement and notice. The very purpose of such service is to enable the persons whose names appear in the draft roll to prefer objections, and that therefore it should be construed as 30 days from the date of service of the draft statement and notice. Thus it is contended that looked at from that point of view, the authorised officer and the Tribunal were not correct in dismissing the objections as time-barred.

4. As against this, the learned Government Pleader would urge that clause (*b*) of sub-section (3) of section 50 has nothing to do with the filing of objections and the only clause which deals with objections is clause (*ii*) of sub-section 3 (*a*) of section 50 and that clause categorically says "30 days from the date of publication". To the same effect is Form No. 24 as well, according to the learned Government Pleader, and the said Form is extracted below.

Form No. 24.

(See rule 45 (2) of the Madras Land Reforms (Fixation of Ceiling on Land) Rules, 1962.

Notice under section 50 (3) (*a*) (*ii*) of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).

Notice is hereby given that the amount of compensation payable for the surplus land acquired by the Government and as determined under section 50 (3) of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961) is specified in the draft compensation assessment roll enclosed. Any person, who has any objection to any entry in the draft compensation assessment roll, may prefer his objection in writing before the authorised officer within 30 days from the date of publication of the said draft in the Fort. St. George Gazette, namely ....

Objections received within the due date will enquired into at (time) "should be after thirty days of the publication of the draft compensation assessment roll". on date at (place) when the objector may appear in person or by authorised agent and adduce any oral or documentary evidence in support of the objections.

Place :

Date : Signature of the Authorised Officer.

Therefore, according to the learned Government Pleader, there is no justification for interference.

5. I have already extracted the relevant section and Form No. 24. To my mind, it appears that under sub-section (3) (*a*) (*ii*) of section 50, objections in respect of any entry in the draft may be preferred by any person within 30 days from the date of publication, which publication is in the Official Gazette. Merely because the Legislature has used the expression "by any person" the said expression cannot be taken to mean that the

persons whose names appear in the draft assessment roll stand excluded. On the contrary, the expression any person is comprehensive enough to take within itself persons whose name appear in the draft as well.

6. Then it may be asked as to where is the necessity to serve a copy of the draft and the notice on a person why has a right to compensation. The answer is simple and such procedure is contemplated so that those persons may be informed of the proceedings. In so far as clause (*b*) of sub-section (3) of section 50 does not contemplate filing of any objections, I see no justification for holding that the time for filing objections in accordance with sub-section (3) (*a*) (*ii*) of section 50 can be extended as within 30 days from the date of service. If I were to hold so, the Court will be legislating instead of interpreting the provision. That certainly is not the function of the Court.

7. It is true from the point of view of equity, something may be said in favour of the petitioners' contention. But where the Act is unambiguous in its terms, the Court cannot in the guise of interpretation add something to the legislation. In other words, any such limitation with regard to preferring of any objection is found in sub-section (3) (*a*) (*ii*) of section 50, namely, thirty days from the date of publication.

8. Secondly, Form No. 24 is a statutory form and it leaves no room for doubt as to point of limitation. Therefore I am unable to take a view different from the authorities below.

9. However, I think that the Legislature must come to the rescue of persons like the petitioner, who are vitally affected by such draft notifications, because their rights are in serious jeopardy. To illustrate :

> "Suppose a person is away from the place where the lands are situate, unless one happens to go though carefully all the publications in the Tamil Nadu Government Gazette, it may not be possible for him to know about the publication. Then again it is very difficult to get the publications sometimes. In these busy days it is impossible to keep track of the events by buying gazettes and perusing carefully all the publications "

Therefore the Legislature will have to think of amending sub-section (3) (*b*) of section 50 of the Act so as to enable persons who are directly affected by the draft roll, to file their objections, by providing that such persons shall file their objections within 30 days from the date of service of notice. After all, it should be remembered that the persons whose lands are acquired need not be obliged to face technicalities and in relation to compensation, there can be fair-play and justice, since all that one gets by way of compensation is hardly worth the property which he is obliged to part with, by the operation of the provisions of the Act, leave alone the sentiments attached to such property.

10. The Civil Revision petition is, however dismissed. There will be no order as to costs.

R. S. —— *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*G. Ramanujam, J.*

Sam Ayya also known as Swaminathan and others ... *Appellants**

v.

Karuppiah Ambalam and others ... *Respondents.*

Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 63 (a) *and 108—Suit for bare injunction to restrain defendants from interfering with plaintiff's right to conduct festival—Suit by one of the trustees, whether maintainable.*

The present suit was filed in a representative capacity for a permanent injunction to restrain the defendants from interfering with

*S. A. No. 1440 of 1978. *27th July, 1982.*

the conduct of festival in the temple. The suit was resisted on the ground that the civil Court had no jurisdiction and the suit was not maintainable when one of the trustees had not been impleaded as co-plaintiff. The suit was decreed and the decree was confirmed on appeal. On second appeal,

Held:—The suit was filed not by the Board of trustees but by some of the trustees and some others as representatives of the residents of the village. Such a representative suit is maintainable even if all the trustees of the temple have not joined. [*Para.* 7.]

Normally the jurisdiction of the civil Court will not be excluded unless the dispute specifically comes within the provisions of section 63 (*e*). The present suit in substance was a representative suit by the villagers and therefore it is not possible to say that the non-impleading of one of the trustees is fatal to the maintainability of the suit. On the facts of the case it cannot be said that the suit was one for establishing a usage and custom. There did not appear to be any dispute as regards usage and custom. The dispute was in substance as to which of the two rival claimants was entitled to the management and conduct of the festival. What the defendants contended was that they were also entitled to conduct the same festival alongside the plaintiffs with the assistance of their pujari. When there was no controversy as to the usage and custom referred to by the plaintiff but the defendants marely said, that they were also entitled to conduct the festival alongside the plaintiffs in the customary manner, the suit could not be taken to involve a dispute regarding the usage and custom prevalent in the temple. The suit is not barred by the provisions of section 63 (*e*) and 108 of the Hindu Religious and Charitable Endowments Act. [*Paras.* 8, 9]

Cases referred to:—

S. Rangayya Gounder v. *Karuppa Naicker*, (1971) 1 M. L. J. 358 ; *Velayudha Goundan* v. *Ponnuswami Udayar*, (1945) 1 M. L. J. 300 : 58 L. W. 287 : A. I. R. 1945 Mad. 234 ; *Chinnathambi Moopan* v. *Mayandi Moopan*, (1966) 1 M. L J. 381 ; *Thirumalaiswami Naicker* v. *Villagers of Kadambur*, (1968) 81 L. W. 342 : I. L. R. (1968) 3 Mad. 638 : A. I. R. 1969 Mad. 108 ; *Krishnaswami Raja* v. *Krishna Raja*, (1966) 79 L. W. 672 ; *Muthuchami Naicker* v. *Samiappa Gounder*, (1973) 86 L. W. 263 ; *Kattayan Achari* v. *Ramaswami Achari*, (1959) 1 M. L. J. 123.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, dated 4th March, 1978 and passed in Appeal Suit No. 1 of 1976 preferred against the decree of the Court of the District Munsif of Devakottai in Original Suit No. 327 of 1974.

M. Srinivasan, for *B. Rajagopalan*, for Appellant.

M. R. Narayanaswamy, for *S. V. Jayaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The defendants in O S. No. 327 of 1974 on the file of the District Munsif, Devakottai who have been unsuccessful in both the Courts below are the appellants.

2. The respondents herein filed a representative suit for a permanent injunction restraining the appellants herein from interfering with the conduct of the festival in Thoothu Ayyanar Singamuga Karuppar and Kaliamman temple at Keerani village. The plaintiff's case is that the villagers of Keerani village have been performing the utsavams like Mahasivarathiri, Deepavali and Kuthirai Yeduppu in the said temple by collecting subscriptions from the villagers, that the temple has been built by the Keerani Villagers, that the festival consists of performance of a drama and of sacrificing ram and cock, that recently the defendants who are the neighbouring villagers and who have no manner of right to interfere with the performance of the festival or the giving of honours to the trustees have joined together and have been creating trouble from 12th July, 1974, and obstructing the conduct of the festival and the proper upkeep of the temple and conduct of utsavam, drama and sacrifice of ram and cock and hence the plaintiffs were

constrained to file the suit for an injunction as set out above.

3. The defendants resisted the suit contending that the suit is a representative capacity is not maintainable, that one of the trustees of the temple has not joined as the plaintiff, that the right claimed by the plaintiffs is not sustainable, that there are two sets of worshippers in relation to the temple, one set being called Melavattam and the other set being called Keelavattam, that the people living in the west of Keerani Village are called Melavattam worshippers and the people living in the village east of the temple were called Keelavattam worshippers, that the plaintiffs do not have the exclusive right to conduct the festival and the utsavams in the temple, that the temple was built and Kumbhabhishekam was performed from contributions from both Melavattam and Keelavattam people and not by Keerani people alone, that the defendants belong to Keelavattam, that they did not interfere with the daily routine poojas and the conduct of festivals, that after Melavattam people offer worship through their poojari, Keelavattam people worship through their own poojari and that, therefore, the Keelavattam people also are entitled to conduct worship with their own poojari and also conduct the festival side by side with the plaintiffs. The defendants also stated that there are two poojaris in the temple, one acting at the instance of Melavattam people and the other acting at the instance of the Keelavattam people, that archanas are done by Melavattam poojari for Melavattam people and by Keelavattam Poojari for Keelavattam people and that the defendants are also exercising their right to offer worship, collection of hundials and doing Kuthirai Yeduppu festival from time immemorial. Therefore the plaintiffs have no cause of action as against the defendants.

4. The trial Court held that the suit is maintainable and that the civil Court has jurisdiction to entertain the suit and the plaintiffs' right to manage the temple and conduct the festivals not having been disputed by the defendants and the defendants not having established their right to conduct the festival alongside the plaintiffs with the assistance of a separate poojari, the respondents are entitled to the issue of an injunction. In this view, the suit was decreed.

5. The matter was taken in appeal to the lower appellate Court and the lower appellate Court confirmed the decision of the trial Court substantially. The lower appellate Court has, however, modified the decree of the trial Court so as to protect the defendants' right to worship the deity in the suit temple as ordinary worshippers without any let or hindrance with the plaintiff's celebrations of festival. The second appeal is directed against the said concurrent judgments of both the courts below.

6. In this second appeal two contentions have been urged (1) The suit is not maintainable in the face of section 63 (*e*) and 108 of the Hindu Religious and Charitable Endowments Act, 1959, and (2) that the suit is not maintainable when admittedly one of the trustees by name Ramaswami has not been impleaded as a co-plaintif.

7. I shall take up the second contention first. As regards this question, the learned counself or the appellants would point out that the fact that one of the trustee of the temple has not joined is fatal to the maintainability of the suit as it is well established that the trustees should act as a body and not independantly. However, this contention of the learned counsel appears to have no substance for the reason that the suit has been filed not by the Board of trustees but by some of the trustees and some others as representatives of the residents of Keerani village. Such a representative suit is maintainable even if all the trustees of the temple have not joined. Though some of the plaintiffs' are trustees in the temple, the suit in substance is a representative suit by the villagers of Keerani and, therefore, it is not possible to say that the non-impleading of one of the trustees is fatal to the maintainability of the suit. Hence I find that the suit is maintainable even though one of the trustees has not been impleaded as a co-plaintiff.

8. Coming to the first question, the contention of the learned counsel is that though the

suit has been framed as one for mere injunction restraining the defendants from interfering with the plaintiff's right to conduct the festival in the temple, it is in effect a suit for declaration of their right to establish a custom and usage which is preval ing in the temple all these years and to establish their right to receive honours and that both the rights have to be agitated under section 63 (*e*) of the Hindu Religious and Charitable Endowments Act and not in a civil Court. Both the Courts below have, as already stated, held that the suit is not one pertaining to the established usages, rituals, and ceremonies and therefore, section 63 (*e*) and section 108 of the said Act is not a bar to the suit. The question is whether the main view taken by the Courts below is tenable.

9. Section 63 (*e*) and section 108 are as follows :

> "63 (*e*) : Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters ....
>
> (*e*) Whether any person is entitled, by custom or otherwise, to any honur, emolument, or perquisites in any religious institution; and what the established usage of a religious institution is in regard to any other matter."
>
> *Section* 108.—No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except, under and in conformity with, the provisions of this Act.

Dealing with the scope of sections 63 and 108 of Act XXII of 1959 this Court, in more or less similar circumstances held in *S. Rangayya Gounder* v. *Karuppa Naicker*[1], that where there are rival claims by two parties to be hereditary trustees of the temple, such a dispute between the parties as to which of them is entitled to be in management and to celebrate the annual festival will not fall within the ambit of section 63 and as such the bar under section 108 will not apply. In that case, after referring to the decisions of Somayya, J., in *Velayudha Goundan* v. *Ponnuswami Udayar*[1], of Veeraswami, J. (as he then was) in *Chinnathambi Moopan* v. *Mayandi Moopan*[2], and of a Bench of this Court in *Thirumalaiswami Naicker* v. *Villagers of Kadambur, Athur Taluk*[3], which clearly laid down that a rival claim as to which out of the two parties is entitled to be in management of the temple and to conduct the festivals therein will not be a dispute falling under section 63 of the Act, this Court held that a suit between two rival claimants to the office of trusteeship was not barred by section 108 in view of section 63. Somayya, J., has held in *Velayudha Goundan* v. *Ponnuswami Udayar*[1], that when there is a dispute between one set of villagers and another set of villagers in relation to the conduct of utsavam in a temple the villagers who prevented the plaintiffs from peacefully carrying on the proceedings and worship of a deity in a temple does not fall within section 73 of the Madras Act II of 1927 corresponding to section 63 of the 1959 Act and as such a suit is maintainable in a civil Court for permanent injunction restraining the defendants from interfering with the conduct of utsavas to the temple by the plaintiff. Veera swami, J., (as he than was) in *Chinnathambi Moopan* v. *Mayandi Moopon*[2], laid down that where the controversy centres round as to which of the rival claimants to the office is entitled to it, it squarely does not fall within the ambit of section 63 (*e*). In *Krishnaswami Raja* v. *Krishna Raja*[4], a Division Bench of this Court held that though the Deputy Commissioner acting under section 57 (*b*) of the Tamil Nadu Act XIX of 1951 has jurisdiction

1. (1971) 1 M. L. J. 358.

1. (1945) 1 M. L. J. 300 : 58 L. W. 287 : A. I. R. 1945 Mad. 234.
2. (1966) 1 M. L. J. 381.
3. (1968) 81 L. W. 342 : I. L. R. (1968) 3 Mad. 638 : A. I. R. 1969 Mad. 108.
4. (1966) 79 L. W. 672.

to decide as to the status of the office of the trusteeship, namely whether it is hereditary or not, he is not competent to go into the further question as to which of the competing claimants is a hereditary trustee or whether both are joint hereditary trustees and that is a matter not covered by the said section and it has to be decided only by a separate suit. In *Thirumalaiswami Naicker* v. *Villagers of Kadambur, Athur Taluk*[1], it has been observed as follows:

"Under section 9, Civil Procedure Code, litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in a civil Court under provisions of the Civil Procedure Code, unless cognisance of the suit is either expressly or impliedly barred. If a suit is otherwise within the jurisdiction of the civil Court the person who seeks to oust the jurisdiction of that Court must affirmatively establish the bar, every presumption being in favour of the jurisdiction of the Court. Exclusion of the jurisdiction of a civil Court in a case where a person asserts a right and seeks remedy cannot be readily inferred."

Having regard to the principle laid down in these cases that normally the jurisdiction of the civil Court will not stand excluded unless the dispute specifically comes within the provisions of section 63 (*e*) the appellant cannot succeed in his submission that the suit is barred by establishing that the dispute comes within section 63 (*e*). In *Muthuchami Naicker* v. *Samiappa Gounder*[2], a suit by members of one community was filed in a representative capacity against the defendants belonging to another community for an injunction restraining them from interfering with the plaintiff's right to conduct and perform the annual congregational worship of the Goddess Kaliamman in the manner in which they are accustomed to do in the month of Vaikasi. The defendants resisted the suit contending, *inter alia* that the suit is one covered by section 63 (*e*) and therefore, the suit is not maintainable. This Court, after considering the various decisions and following the decision of P. N. Ramaswami, J., in *Kattayan Achari* v. *Ramaswami Achary*[3], held that such a suit is maintainable. The observations of P. N. Ramaswami, J. which were quoted with approval by the learned Judge in that case are as follows:

"A suit by one section of a community against a rival section of that community to enforce their right to participate along with the defendants in the conduct of a ceremony of their tutelary deity from which the plaintiffs have been excluded, and to ask for accounts of a fund constituted out of collections made by all the members of the community, including the plaintiffs to find out whether the terms of the community chest are being carried out cannot be held to be a suit for 'administration or management' which is excluded from the jurisdiction of a Court of law. A dispute of this nature between rival claimants seeking to ensure that the fund earmarked for a particular purpose is being managed properly would not fall under section 57 of the Act so as to render a suit regarding such a dispute, a suit for administration or management even in a side sense."

10. The learned counsel for the appellant would further contend that the suit is one for establishing a usage and custom in the conduct of the festival in the temple and, therefore, it will come within the purview of section 63 (*e*) of Tamil Nadu Act XXII of 1959. However, on the facts of this case it cannot be said that the suit is one for establishing a usage and custom. On the facts of this case there does not appear to be any dispute as regards the usage and custom. It is not a case where the plaintiffs are trying to establish a particular custom and usage and the defendants are seeking to establish to the contrary. What in substance the dispute between the parties is as to who between the two rival claimants is entitled to the management and conduct of the festival. As a matter of fact the defendants did not dispute the plaintiffs' right to be in management of the temple and conduct the various festivals in the customary manner. What the defendants contend is that they are also entitled to conduct the same festival alongside the plaintiffs with the assistance of their poojari. When there is no controversy as to the usage and custom referred to by the plaintiffs but the defendants merely say that they are also entitled to conduct the festival alongside the plaintiffs in the customary

1. (1968) 81 L. W. 342 : I. L. R. (1968) 3 Mad. 638 : A. I. R. 1969 Mad. 108.
2. (1973) 86 L. W. 263.
3. (1959) 1 M. L. J. 123.

manner, the suit cannot be taken to involve a dispute regarding the usage and custom prevalent in the temple. The lower appellate Court correctly appreciates the nature of the suit by observing that the relief claimed is an injunction restraining the defendants from interfering with the plaintiffs' right to conduct certain celebrations, that the defence to the suit is that the defendants are not causing obstruction to the plaintiffs' celebrating the festival but they are having independent right to have the festival in the temple side by side along with the plaintiffs. Thus the defendants have conceded the plaintiffs' right to conduct the festival in the established manner and they merely claim a right to conduct the festival separately on the same day in the suit temple. The plaintiffs' right to perform the festival in the usual manner has not been disputed by the defendants and they merely claim a rival right to conduct the festival in the said temple in the same manner. It will be clearly seen that the controversy between the parties is as to whether the defendants have also the right to perform the festival in the temple along with the plaintiffs and the dispute is not with reference to any particular custom or usage prevalent in the temple.

11. In this view of the matter, I am in entire agreement with the view taken by the Courts below that the suit is not barred by the provisions of sections 63 (*e*) and 108 of the Act.

12. Therefore both the questions raised by the appellants having failed, the second appeal is dismissed. There will, however, be no order as to costs.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

V. S. **Ramanathan** .... *Appellant**

v.

R. Subbulakshmi and another ... *Respondents.*

Hindu Marriage Act (XXV of 1955), section 13-A (introduced by the Amending Act LVI of 1976) — Applicability — Husband seeking divorce on ground of wife living in adultery with her foster-father—Divorce refused—Judicial separation sought in the alternative—When such prayer will be available—Expression "having regard to the circumstances of the case" occurring in section 13-A—Meaning—Divorce cases—Burden of proof in proper approach.

Held: Fornication-between a foster-parent and his ward is not exactly incestuous. Yet it is too revolting to the human mind to be of frequent occurrence even in imaginative fiction. The possiblity of such cases might render the task of distinguishing a genuine relationship from the bogus. It only underlines the caution that charges of illicit intercourse should not be countenanced except on the basis of strict proof. [*Para.* 21.]

Incest is so abhorrent to mankind that one should expect the strictest proof for concluding that it exists in any given case. Although the relationship between the foster-parent and a foster-daughter is not based on consanguinity any sexual connection between the two in just as bad as incest. [*Para.* 8.]

Relying heavily on its reading of the background circumstances the trial Court's conclusion as to adultery was not only a wrong guess, but wholly heartiess and perverse, to inferring adultery by the mere fact of the wife's living under the same roof with her foster-father is irrational. The appellate Court, on the other hand, had drawn the correct inference from the facts. It rightly rejected the evidence of the husband as untrue. [*Paras*. 8 *and* 9.]

*C. M. S. A. No. 58 of 1976. *5th March*, 1979.

The request to pass a decree for judicial seperation as the proper one in the circumstances of the case is based on a misconception of section 13-A of the Hindu Marriage. Act. The crucial word in the section is "instead". This means that for a Court to act under this section the Court must be in a position to hold that the petitioner is entitled to a divorce, but "instead" of granting a decree for divorce a decree of judicial separation must be made as the preferred way of disposal of the case. The section does not mean that where the petitioner has completely failed to make out any case, the Court can even simply present him with a decree for judicial separation, as if it were some consolation prize. [*Para.* 11.]

In this case the appellate Court was quite justified, on the evidence on record, in rejecting the ground put forward by the husband for the grant of divorce. These findings therefore rule out the application of section 13-A. The words "having regard to the circumstances of the case" occurring in section 13-A do not operate and are not intended to operate in the void. The Court must first be in a position to uphold the grounds for divorce urged by the petitioner, in order to consider the feasibility of the passing of a decree for judicial separation "having regard to the circumstances of the case". The plea of the husband on the basis of section 13-A has to be rejected, not only because of the absence of circumstances which are indicative of its application, but also because the section itself does not, and cannot come into play. [*Para.* 13.]

Trial of divorce cases might have now-a-days almost become a routine, like promissory note suits. Even so, in the trial and understanding of these cases the Courts must bring to bear a human approach. It is laid down by the legislature itself that the Court will have to try whether the parties could not be brought together before proceeding to enter upon an enquiry. [*Para.* 14.]

Appeal against the judgment and decree of the District Court (Principal District Judge), Madurai, dated 25th March, 1975 and passed in C. M. A. No. 94 of 1974 (O. P. No. 38 of 1971, on the file of the Court of the Subordinate Judge, Madurai.)

V. Ganapathy Subramania Iyer, for Appellant.

K. Ramaswami, A. Sarojini Bai, V. Venkataswami and *Sundara Bhashyan*, for Respondents.

The Court delivered the following

JUDGMENT.—In this matrimonial case, a husband accused his wife of living in adultery with her own foster-father. He asked for a divorce on that ground. The trial Court granted him a decree. But the District Court in appeal reversed it. In the second appeal the same outrageous allegation is again made by the husband against his wife.

2. Fornication between a foster parent and his ward is not exactly incestuous. Yet it is too revolting to the human mind to be of frequent occurrence even in imaginative fiction. There is only one modern classic I know of in this genre : Nabakov's "Lolita". But even in that literary masterpiece, the principal characters were quite abnormal. One was a self-confessed old reprobate ; the other was a teasing teenage nymphet. Such an unholy combination must be extremely rare in real life, almost as infrequent as rank incest. I do not rule out cases where individuals may practise sex behind closed shutters, all the while masquerading outside under an assumed consanguinity. The possibility of such cases, or, rather, the prepossession in one's mind of their existence, might render difficult the task of distinguishing a genuine relationship from the bogus. But all this must only further underline the caution that we should not countenance charges of illicit sexual intercourse excepting on the basis of strict proof.

3. The trial Court observed in this case that direct evidence of adultery is well-nigh impossible. So it is, with most murders too. But that does not mean that a Court of law can grant a divorce for the mere asking, any more than it can send a man to the gallows on pure suspicion.

4. The husband in this case had made two bold assertions in his petition for divorce. One was that his wife was having sexual intercourse with her foster-father. The other was that he himself had no sexual intercourse with her and a child born to her was not his, but the foster-father's. He went into the witness box and gave evidence to this effect. But his own letters addressed to his wife as well as his father-in-law clearly showed that not only

did he sleep with his wife and made her with child but that he had discussed plans for her forthcoming seemantham. In the teeth of these letters he nevertheless had the temerity to tell the Court that he was innocent of carnal knowledge of his wife and suspected that the child was not his. Both the trial Court and the first appellate Court rightly disbelieved this part of his evidence. Nevertheless, this did not prevent the trial Court from holding, on the basis of what it recorded as the "general background of life between the parties" that the wife had committed adultery with her foster father.

5. As to the family background there was hardly any dispute between the parties. The wife's foster parents were anaged childless Brahmin couple in Madurai. The foster mother was not in the best of health as she had innumerable abortions. The girl had come into the household in 1962 having lost her father, after her widowed mother had left her to reside with some relations. From her early teenage, the girl was living in the same house with her foster parents. It was the foster father who got this girl a teaching job in a local school at Madurai. It was he who had come forward to arrange for her marriage. It was he who paid the dowry to the bridgegroom and undertook the wedding expenses. The foster father was in his late fifties when the marriage took place.

6. The trial Court, however, took note of a letter produced by the husband at the trial which the Court regarded as containing a confession by the wife that she was committing adultery with her foster father. This was an inland letter without a post mark, written in the hand of the wife. The husband's case was that the wife had written that letter and had sealed it and had given it for mailing, but he got it interceted when neighbour's urchin was about to take it to the pillar-box. The wife admitted in her evidence from the witness-box that the letter was written by her. But she said that she was not in full control of her will when she wrote it. She stated that her husband had given her some veeboothi and then commended her to write the letter to his own dictation. She asserted that the contents of the letter were untrue. The trial Court, however, rejected her evidence. It accepted the husband's testimony to the effect that he had nothing to do with the composition of the letter and that it was done voluntarily by the wife and at her own will. The Court rejected the contention put forward on behalf of the wife that she wrote it in a state of automatism. The Court wondered as to whether veeboothi or sacred ash could bring about this result.

7. The appellate Court, however, accepted the version of the wife. It said that the letter could not have been written voluntarily although it was in her own hand. The appellate Court observed that there was no occasion whatever for the wife writing such a letter to her foster parents when all the while she has been living with the foster father even after the marriage and only waiting for her husband to get a transfer to Madurai to come and live with her. The appellate Court rejected the evidence of the husband, having found that he had not told the truth as respects his own relationship with his wife after the marriage.

8. In this understanding of the evidence in one way by the trial Court and the other by the appellate Court, this case has really to be decided on the conventional formula as to whether there was any evidence to support to finding of the appellate Court. I am satisfied that not only was there ample evidence in support of the conclusion of the appellate Court, but the trial Court had no evidence whatever to have decided the case the other way about. As I earlier pointed out, the trial Court relied heavily on its reading of what the background circumstances of this case were. It seems to me that the trial Court did not draw the proper legal inference but jumped to irrational conclusion on the question of adultery by the mere fact of the wife living under the same roof with her foster-father. As this rate, I wonder whether it would not be possible for any Court to infer improprieties in the relationship between persons living under the same roof as brother and sister, father and daughter, and the like. As I said before, incest is so abhorrent to mankind that one should expect the strongest proof for concluding that it exists in any given case. Although the relationship between a faster parent and a foster-daughter is not based on

consanguinity, any sexual connection between the two is just as bad as incest. For this kind of relationship to be known to exist in any given case the Court would have to have stringent and the most cogent and convincing pieces of evidence to come to a conclusion that there was any such impropriety. From this standard, the trial Court's conclusion was not only a wrong guess, but wholly heartless and perverse.

9. The appellate Court, on the other hand, had drawn the correct inference from the facts. It rightly rejected the evidence of the husband as untrue, placing reliance on the testimony on the side of the wife as acceptable especially when not only the aged-foster father but also the ailing foster-mother had come into the witness box and faced the cross-examination.

10. Learned counsel for the husband then sought to put forward a legal submission on the basis of section 13-A of the Hindu Marriage Act, 1955. This section was introduced by amending Act XLI of 1976. The text of the section is as follows :

> "13-A. *Alternate Relief in Divorce Proceedings.*—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (*ii*), (*vi*) and (*vii*) of sub section (1) of section 13, the Court may, if it considers it just having regard to the circumstances of the case, pass instead a decree for judicial separation."

11. Learned counsel invoked this new provision and urged me to pass a decree for judicial separation as the proper one in the circumstances of this case. I think the request of the learned counsel is based on a misconception of section 13-A of the Act. The crucial word in the section is "instead". This means that for a Court to act under this section the Court must be in a position to hold that the petitioner is entitled to a divoree, but 'instead' of granting a decree for divorce, a decree for judicial separation might be made as the preferred way of disposal of the case. The section does not mean that where the petitioner has completely failed to make out any case, the Court can even then simply present him with a decree for judicial separation, as if it were some consolation prize.

12. In this case, I have held that the appellate Court was quite justified, on the evidence on record, in rejecting the ground put forward bp the husband for the grant of divorce. These findings therefore rule out the application of section 13-A.

13. Learned counsel, however. laid stress on the words "having regard to the circumstrances of the case" occurring in section 10-A and said that those circumstances are present in this case. I hold that these words do not operate and are not intended to operate in the void. As I earlier pointed out, the Court must first be in a position to uphold the grounds for divorce urged by the petitioner, in order to consider the feasibility of passing a mere decree for judicial separation "having regard to the circumstances of the case". The plea of the husband on the basis of section 13-A has to be rejected, not onlybecause of absence of circumstances which are indicative of its application, but also because the section itself does not, and cannot, come into play in this case.

14. Before ending the matter with the formal words of disposal of the second appeal, I think I should remark on the way in which both the Courts below had approached the matter in issue before them although each differed from the other in the ultimate conclusion. Here was a case where a husband was accusing his wife of a heinous matrimonial diviation in way which would outrage civilized people's sensibilities on prohibited degrees of sex relationship. There is no evidence however, that either Court was scandalised by the nature of the case. Their judgments give the impression that they have dealt with the controversy in in this petition as yet another addition to the statistics of their disposals, and nothing more. They have set down the pleadings, the formulations of the issues, the discussion of the evidence and the findings under each issue, all in numbered paragraphs, without any show of concern, very mechanically. It is not known whether they were disturbed at all by the kind of case which

they had to go though and determine. Not one comment was made even about the strangeness of the allegations, the base character of the testimony and the like. Divorce cases might be on the increase nowadays. And trial of such cases might have almost becomes a routine, like promissory note suits. Even so, it seems to me that in the trial and the understanding of these cases, the Courts must bring to bear a human approach. They must hear the cases with their ears as close to their hearts as to their reasoning faculties. Even the legislature, in drawing up the statute, has accepted the human approach as the desideratum in the trial of these cases when it laid down that the Court will have to try whether the parties could not be brought together, before proceeding to enter upon an inquiry. The judgments of the Courts below do not disclose whether any attempts in this direction was ever made either at the trial stage or at the stage of first appeal. When the matter came to me in second appeal, however. my own nature and the mandate of the statute prompted me to find out if the parties could come together without an adjudication by me of the second appeal. I called not only the husband and the wife to come to Court in person but also summoned the foster-father. The wife's attitude was to let byegones be bygones. Even after all the happenings inside the Court and outside she was ready to join her husband. The husband, however set his face against any settlement and was keen in getting on with the second appeal and obtain a decision from this Court, I have earlier entered my conclusions on the points arising in the appeal. For the reasons stated therein, I hold that there is no merit in this civil miscellaneous second appeal. The order and decree of the lower appellate court are confirmed. The civil miscellaneous second appeal is dismissed. The appellant will pay the costs of the respondents.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

A. Jabar Khan ... *Petitioner**

v.

Mohamed Kasim ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 11 (4) and Tamil Nadu Agriculturist's Relief Act (IV of 1938), section 19-A read with section 9-A of the Act—Usufructuary mortgage of residential house for Rs. 4,000 followed by lease back the next day in favour of mortgagor on a monthly rental of Rs. 70—Mortgagor also executing later simple mortgage for Rs. 2,000 at 18 per cent. interest per month—Non-payment of rent by mortgagor—Notice terminating lease—Mortgagee filing eviction petition—Eviction ordered—Appeal to Appellate Authority by mortgagor—Pending appeal mortgagee filing application under section 11 (4) of the Act—Mortgagor directed to deposit the arrears of rent—On default, order made directing delivery of possession—Earlier suit by mortgagee for arrears of rent decreed—Decree confirmed in appeal—Petition by mortgagor under section 19-A read with section 9-A, Tamil Nadu Agriculturists Relief Act for redemption of the mortgagee—Mortgagor directed to pay only principal amount after scaling down the interest to a norminal amount —Order confirmed in appeal——Order of the Civil Court wiping off, the arrears of rent— Impact on order of eviction under section 11 (4) of the Rent Control Act.

The petitioner, owner of a residential building, mortgaged it usufructuarily to the respondent for Rs. 4,000. On the next day the mortgagee leased back the building to the mortgagor at a monthly rent of Rs. 70. Sometime later the mortgagor executed a simple mortgage for Rs. 2,000 in favour of the mortgagee carrying interest at 18 per cent.

*C. R. P. No. 1347 of 1977. *26th November, 1982.*

per annum. Rent not being paid the mortgagee gave notice terminating the tenancy and followed it up by filing a petition for eviction under the Rent Control Act. Eviction was ordered by the Controller. Pending appeal therefrom to the Appellate Authority, the mortgagee preferred an application under section 11 (4) of the Act, to direct the mortgagor to deposit the arrears of rent due. In the meantime the mortgagee had also filed a suit for recovery of the arrears of rent. The suit was decreed on 31st January, 1974 and confirmed in appeal. The mortgagor filed a petition under section 19-A read with section 9-A of the Tamil Nadu Agriculturists' Relief Act, 1938, for redemption of his mortgages. The Sub-Court held that the mortgagor was bound to pay only the principal amount, namely Rs. 6,000 since he was entitled to have the interest scaled down to a nominal sum. The order was confirmed, on appeal by the District Court. Overruling the objections of the mortgagor based on the scaling down order, the Appellate Authority asked him to deposit Rs. 5,230 and on non-compliance passed an order on 13th December, 1976, for delivery of possession. In revision to the High Court against the order it was contended that the scaling down order had become conclusive, nullifying the proceedings under the Rent Control Act, and wiping out what were arrears of rent.

Held:—It is not open to the Rent Controller or the Appellate Authority to ignore the finding of a Court of competent jurisdiction which had adjudicated upon the claim of the debtor or mortgagor under section 19-A of the Agriculturists' Relief Act. Any such order is amenable to an appeal or other proceedings by way of corrective under that Act. But collaterally no attack can be made on that order arrived at in a regular adversary proceedings in the presence of both the parties, on the very question whether anything was due by the mortgagor and whether he should be deemed to have discharged any interest in arrears. [*Para.* 8.]

To allow the application filed by the mortgagee-landlord under section 11 of the Rent Control Act should be to permit the mortgagee-landlord to obtain by a side-wind what he had lost in the proceedings under the Agriculturists' Relief Act. The mortgagee cannot obtain an adjudication in this case about the character of the arrears before the Rent Controller, because that would amount to re-opening a final order from a proper forum which is competent to render the adjudication. Our legal system can hold together only on the basis of the comity of Courts and tribunals. All of them co-exist in simultaneous exercise of their respective jurisdictions in their respective fields. Where, therefore, a particular tribunal had rendered a decision *inter partes* on a matter within its competence, it would not subsequently be open to either party to ignore that determination or seek to obtain a different determination in a different forum where they confront each other in a legal controversy on the same issue. [*Paras.* 10 *and* 11.]

The appellate authority in its order characterised the relationship between the parties as a dual relationship mortgagor and mortgagee as well as landlord and tenant. This dual relationship was employed by the Appellate Authority as a justification for not paying heed to the order of the Sub-Court scaling down the interest. In any case, at this moment of time when this revision is being disposed of, the mortgagee must be taken to have accepted the finality of adjudication of scaling down under the Agriculturists' Relief Act; that order is binding on him. According to that order, what the mortgagor owes him is not rent in arrears which had been scaled down to a nominal figure. Therefore it must be taken that the mortgagee has accepted the adjudication to the effect that he remains a mortgagee throughout and he is not the landlord of the mortgaged property and that the mortgagor is not his tenant but only his mortgagor owing the principal amount and a very negligible amount of interest, as scaled down. In the face of this legal position, it would not be proper to allow the mortgagee to have the benefit of any order of eviction under section 11 (4) of the Rent Control Act, as if the mortgagor shall be regarded as holding the position of a tenant who not only had defaulted to pay the rent, but had also defaulted to deposit it in the Rent Control Court. [*Para.* 13.]

The uncertain attributes of the jural relationship between the parties have been responsible for the parallel proceedings

between them, one under the Rent Control Act and the other under the Agriculturists' Relief Act. But there must be a finality to the parallel proceedings of this kind, and for the reasons stated the order of the Appellate Authority under section 11 (4) of the Rent Control Act must be regarded as without jurisdiction. [*Para.* 14.]

Case referred to:—

Abdul Rasheed v. *Abdul Batcha*, (1979) 2 M. L. J. 341.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Order of the Court of the Principal Subordinate Judge, Tiruchirapalli dated 13th December, 1976, and made in I. A. No. 532 of 1976 in H. R. C. C. M. A. No. 168 of 1976, H. R. C. O. P. No. 369 of 1974 on the file of the Additional District Munsif of Tiruchirapalli.

S. M. Abdul Wahab, for Petitioner.

K. Sarvabauman, for Respondent.

The Court made the following

ORDER.—Jafar Khan, the petitioner in this Civil Revision Petition, is the owner of a residential building in Tiruchirapalli. He subjected this building to two mortgages. One was a simple mortgage for Rs. 2,000 at 18 per cent. interest under a registered document dated 16th June, 1970, in favour of the respondent, Mohamed Kasim. A little while earlier, on 23rd April, 1970, he created a usufructuary mortgage in favour of the same Mohammed Kasim over the same building for Rs. 4,000 under a deed of usufructuary mortgage. However, on the very next day, namely, 24th April, 1970, Mohamed Kasim, the usufructuary mortgagee, executed a lease back of the said building to the mortgagor Jafar Khan on a monthly rent of Rs. 70.

2. While so, right from the date of the lease back, namely 24th April, 1970, Jafar Khan did not pay any rent to the mortgagee, Mohamed Kasim. In these events Mohamed Kasim, after issuing a notice of termination of tenancy, filed an eviction petition before the Rent Controller, Tiruchirapalli, for an order of eviction of Jafar Khan on the ground of wilful default under the Tamil Nadu Buildings (Rent Control) Act, 1959. The Rent Controller ordered eviction of Jafar Khan. An appeal, was filed by Jafar Khan before the appellate authority, namely, the Subordinate Judge, Tiruchirapalli against the order of eviction. Pending disposal of the appeal against the order of eviction, the mortgagee, Mohamed Kasim, filed an application under section 11 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, directing Jafar Khan to deposit the arrears of rent of Rs. 5,460 which had accrued due at Rs. 70 per mensem from 24th April, 1970, onwards. That petition was opposed vehemently by Jafar Khan on various grounds. But the appellate authority overruled all the objections and passed an order directing Jafar Khan to deposit Rs. 5,230 pending disposal of the appeal and since the amount was not deposited, he ultimately passed an order on 13th December, 1976, under section 11 (4) of the Rent Control Act directing delivery of possession of the property to the mortgagee Mohamed Kasim. It is against the order of the appellate authority that this civil revision petition has been brought.

3. The main contention raised by Jaffar Khan's learned counsel, Mr. Abdul Wahab, is that the proceedings under section 11 (4) of the Rent Control Act did not lie at all in this case. It is necessary to examine this question from the particular angle from which it was advanced. Mr. Abdul Wahab does not contest the legal position that even a usufructuary mortgagee can be regarded as a landlord fot purposes of the Rent Control Act within the meaning of the expression 'landlord' as defined in section 2 (*b*). For the expression 'landlord' in that interpretation clause bears an inclusive definition, so as to include within the category of landlords "a person who is receiving or is entitled to receive the rent of a building". There is no denial by the learned counsel that under the terms of the agreement dated 24th April, 1970, following closely upon the heels of the usufructuary mortgage on 23rd April, 1970, Mohamed Kasim, being in the position of a mortgagee-lessor, must be regarded as

andlord within the meaning of the Act since he was entitled to receive rent for the building. The real point which learned counsel urged in this revision was that although a landlord-tenant, relationship might be held to have been established by the lease-back agreement dated 24th April, 1970, and although in one sense, the non-payment of the monthly dues of Rs. 70 by Jafar Khan might be regarded as default in the payment of rent, learned counsel contended that in the peculiar circumstances of the case, no authority functioning under the Rent Control Act could entertain and dispose of proceedings under section 11 of the Act. According to learned counsel, at some stage at least, if not always, the relationship between the parties was recognised as that of landlord and tenant, and the so-called rent arrears were seen to be only arrears of interest.

4. For examining this part of the learned counsel's argument, it is necessary, to refer to a few more facts, or rather to certain other legal proceedings, in which the parties were involved. Mohamed Kasim, in his character as landlord of the building, filed a suit against Jaffar Khan for recovery of arrears of rent, which stood at Rs. 5,450. That suit was decreed on 31st January, 1974. Subsequently, the decree was confirmed in appeal. Meanwhile, Jafar Khan filed a petition under section 19-A of the Tamil Nadu Agriculturits' Relief Act, 1938 read with section 9-A of that Act for redemption of the mortgages. The Sub-Court entertained the application and held that Jafar Khan was bound to pay only the principal amount under the two mortgages totalling in all Rs. 6,000 and that he was not bound to pay the entire sum of Rs. 5,450 as arrears, but was entitled to have it scaled down to a nominal amount. This order was confirmed in appeal by the District Court, as I was informed at the bar.

5. The point urged by Jafar Khan before the appellate authority in the proceedings under section 11 (4) of the Rent Control Act was that the order passed by the Sub-Court holding that a negligible amount alone was due to Mohamed Kasim as interest apart from the principal amount of the usufructuary mortgage of Rs. 4,000 and simple mortgage of Rs. 2,000 was conclusive between the parties and further that the said order has also nullified the proceedings under section 11 (4) of the Rent Control Act. Learned counsel submitted that there was no rent, much less arrears of rent, due by Jaffar Khan to Mohamed Kasim within the meaning of section 11 of the Act when the self-same parties had litigated the self-same amount in different proceedings on the footing that it represented interest on the mortgages and an adjudication was rendered by a competent Court which had also become final as between the parties. The contentions were rejected by the appellate authority and hence tne petitioner Jafar Khan is before his Court in revision.

6. The question is what can were originally arrears of rent be regarded as having been wiped out by the order passed by the Sub-Court in O. P. No. 165 of 1974 in proceedings under section 19-A of the Agriculturists' Relief Act or whether, notwithstanding those proceedings, the mortgagee-landlord was entitled to obtain an order of determining the arrears of rent under section 11 (1) of the Rent Control Act and on failure to deposit the amount so determined, he was entitled to an order of eviction in his favour under section 11 (4) of the Rent Control Act.

7. A plethora of case-law was cited on both sides, all of which have been referred to in a recent judgment of Sathiadev, J., in *Abdul Rasheed* v. *Abdul Batcha*[1]. That was, however not a case of rent control proceedings. That was a simple case where there was a usufructuary mortgage and a lease back by the mortgagee to the mortgagor, the rent under the lease back taking the place of interest. The question was, whether in such a case, Act IV of 1938, as amended subsequently, can be invoked so as to grant relief to the mortgagor. The learned Judge was there concerned with the question whether a suit would lie for redemption with a claim for the relief under Act IV of 1938 by the mortgagor concerned. In that case, it was found as a fact that there was a separate transaction of lease by which the

1. (1979) 2 M. L. J. 341.

hypothecated property was leased back by the mortgagee to the mortgagor. According to the learned Judge, this converted the jural relationship between the mortgagor and mortgagee into one of tenant and landlord and once this new relationship was created, the rights and obligationes flowed only on that basis, and not as mortgagor and mortgagee. The learned Judge proceeded to hold that there was no scope under section 9-A of the Agriculturists' Relief Act for deeming the rent in arrears as interest, since that is covered by and arises out of an independent transaction of lease back. The learned Judge accordingly observed that when the mortgagor filed an application under section 19 of the Agriculturists Relief Act, it could not be gainsaid that his position was that of a tenant, pure and simple, the earlier mortgagor-mortgagee relationship having undergone a metamorphosis. In these circumstances, the learned Judge held that the proecedings under section 19 of the Agriculturists' Relief Act did not lie.

8. This decision of Sathiadev, J., typifies the kind of decision a Court should render when an application is presented before it under section 19 of the Agriculturists' Relief Act and it appears from the facts and course of dealings between the parties that the applicant is oniy in the position of a person who is in arrears of rent, although the transaction began as a usufructuary mortgage. In the present case, I am not in the position of having to administer the provisions of the Agriculturists' Relief Act. The order under revision in the present case is not an order of a Court of competent jurisdiction which has entered upon an inquiry on an application under section 19 of the Agriculturists' Relief Act. If this revision were against any such order, I have no doubt that Sathiadev, J.'s decision, following a catena of earlier decisions of this Court, must be followed. This revision, however, is not directed against the order sealing down the interest under the Agriculturist's Relief Act. It is, on the contrary, an order passed by a Rent Controller, or to be exact, by an appellate authority sitting in appeal over the Rent Controller. The case of the mortgagee-landlord before the appellate authority was that the tenant-mortgagor was in arrears of rent and, therefore, he had to be evicted from the premises. It was for that purpose and to obtain an order for deposit of the rent arrears that the landlord-mortgagee applied under section 11 (1) of the Act. This involved the appellate authority having to go into the question whether any rent was due from the tenant to the landlord, and, if so, whether the arrears would be regarded as a consequenee of wilful default. At the hearing of those proceedings, the appellate authority was presented with a decision of the Sub-Court which was binding on both parties in proceedings under section 19 of the Agriculturist' Relief Act. What is the position of the Rent Controller or the appellate authority in such a case? It seems to me that it is not open to the Rent Controller or the appellate authority to ignore the finding of a Court of competent jurisdiction which had adjudicated upon the claim of a debtor or a mortgagor under section 19 of the Agriculturists' Relief Act. Any such order is amenable to an appeal or other proceedings by way of corrective under that Act. But collaterally, no attack can be made on that order, especially when it had been arrived at in a regular adversary proceedings in the presence of both the parties who had joined issue on the very question whether anything was due by the mortgagor and whether he should be deemed to have discharged any interest in arrears.

9. It is all very well to argue on the nomenclature used by the parties and enter into a debate as to whether it is rent due or interest due. But once the amount has been all but wiped out by a competent order of Court, it is not, I think open to the Rent Controller or the appellate authority, even though functioning under the Rent Control Act to ignore that order and proceed as though Rs. 5,450 was still in arrears and that represented rent arrears. What is worse, when under the order of the Sub-Court, the arrears had been scaled down to a nominal amount, it is not open to the appellate authority under the Rent Control Act to pass a contradictory order directing the mortgagor-tenant to deposit the entire amount of Rs. 5,450 under threat of passing a consequential eviction order.

10. To allow the application filed by the mortgagee-landlord under section 11 would be to permit the mortgagee-landlord to obtain by a side-wind what he had lost in the proceedings under the Agriculturists' Relief Act. The law as laid down by this Court

over the years with Sathiadev, J.'s judgment marking the culmination of the case-law does put us on an enquiry about the relationship between the usufructuary mortgagor and mortgagee who also bear the relationship of lessee and landlord. But that kind of inquiry is no longer available to a Court or tribunal when the question had already been thrashed out and decided in another proceeding by a Court having jurisdiction to decide that question. This is the position in the present case. Mohammed Kasim, the mortgagee could not obtain any adjudication in this case, about the character of the arrears before the Rent Controller because that would amount to reopening a final order from a proper forum which is competent to render the adjudication. In the face of the law laid down by Sathiadev, J. and the earlier decisions, it might be that the Sub Court's decision is palpably wrong. Even so, right or wrong, the decision holds the field in this case, at any rate so far as the parties to the proceedings are concerned.

11. Our legal system comprises within its complex structure a number Courts, tribunals or quasi-judicial authorities. The whole edifice of this system assiduously built over a century or so will go to pieces if a tribunal or Court simply ignores the determination come to by an earlier Court or tribunal of competent jurisdiction in relevant proceedings between the same parties. Our system can hold together only on the basis of the comity of Courts and tribunals. All of them co-exist in simultaneous exercise of their respective jurisdictions in their respective fields. Where, therefore, a particular tribunal had rendered a decision *inter partes* on a matter within its competence, it would not subsequently be open to either party to ignore that determination or seek to obtain a different determination in a different forum where they confornt each other in a legal controversy on the same issue.

12. In the case, it might well be asked whether the proceedings filed by Jafar Khan before the Sub-Court under section 19 of the Agriculturists' Relief Act was competent when he was all the while up against an eviction petition which was even then pending disposal before the Rent Controller. It might also be asked whether the Sub-Court was competent to pass an order scaling down the amount claimed as arrears of interest when at that precise moment the Rent Controller had already passed an eviction order against Jafar Khan. If it were open to this Court to go into the validity or otherwise of the Sub-Court's order, the possible answer would be that the Sub-Court might have desisted from proceeding to exercise its jurisdiction for the simple reason that being a rent arrear it could not be regarded as a proper subject for scaling down under the Agriculturists' Relief Act. But as I earlier observed, I am not now sitting in judgment over the Sub-Court's order. The latest information is that the Sub-Court's order has since been confirmed in appeal by the District Court, Tiruchirapalli, and no further prceedings have been taken by Mohamed Kasim against the decree for redemption passed by the Sub-Court on the basis of the scaling down of the interest. The question whether these proceedings between the parties under the Agriculturists' Relief Act are or are not competent is no longer an issue because the matter has become final as between the parties. As earlier mentioned the Sub-Court had by then scaled down the interest at the time the appellate Court took up for disposal the applications filed by Mohamed Kasim under section 11 (4) of the Rent Control Act.

13. The appellate authority in its order characterised the relationship, between the parties as a dual relationship, mortgagor and mortgagee as well as landlord and tenant. This dual relationship was employed by the appellate authority as a justification for not paying heed to the order of the Sub-Court sealing down the interest. It may be agreed that the relationship between the parties may not have been clearly defined or may be regarded as dual relations according to the appellate authority. But that is no reason for the appellate authority's proceeding to render a decision quite contrary to the one which had been rendered earlier by the Sub-Court. In any case, at this moment of time when this revision is being disposed of. Mohamed Kasim must be taken to have accepted the finality of the adjudication of sealing down under the Agriculturists' Relief Act. That order is binding on him. According to that order, what Jafar Kban owes him is not rent in arrears, but only interest on

borrowed money and it was the interest arrears which had been scaled down to a nominal figure. I must, therefore, take it that Mohamed Kasim has accepted the adjudication to the effect that he remains a mortgagee throughout and is not the landlord of the mortgaged building and that Jafar Khan is not his tenant, but only his mortgagor owing the principal amount and a very negligible amount of interest, as scaled down. In the face of this legal position, it would not be proper to allow Mohamed Kasim to have the benefit of any order of eviction under section 11 (4) of the Rent Control Act, as though Jafar Khan can still be regarded as holding the position of a tenant who not only had defaulted to pay the rent, but had also defaulted to deposit it in the Rent Control Court. To assure that position now, would involve this Court into ignoring the binding character of the scaling down proceedings under the Agriculturists' Relief Act. It would go against the comity of Courts.

14. The uncertain attributes of the jural relationship between the parties have been responsible for the parallel proceedings between them, one under the Rent Control Act and the other under the Agriculturists' Relief Act. But there must be a finality to parallel proceedings of this kind, and for the reasons I have earlier stated the order of the appellate authority under section 11 (4) of the Rent Control Act must be regarded as without jurisdiction.

15. The civil revision petition is allowed at the order of the appellate authority is set aside. But, having regard to the peculiar circumstances of the case, there will be no order as to costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Balasubrahmanyan, J.*

Sri Maheswari Commercial Finance Corporation, Tiruvamamalai, by its Managing Partner Valaguru Mudaliar, 2, Anaikatti Street, Tiruvannamalai.

... *Petitioner**

v.

Kumaran Commercial Finance Corporation, Tiruvannamalai, by its Managing Partner, M. Chinnaraj, 146, Kumara Koil Street, Tiruvannamalai and others

... *Respondents.*

(A) *Indian Partnership Act (IX of 1932), sections 63, 72, 45 and 37—Retirement of partner when takes effect.*

(B) *Tamil Nadu Partnership (Registration of Firms) Rules (1961), rules 5, 6—Scope.*

(C) *Civil Procedure Code (V of 1908), Order 21, rule 46 (A)—Scope and applicability—Garnishee's liability to pay debt to the judgment-debtor.*

'*V*', mother of '*M*' was a partner of a commercial Corporation, a registered partnership firm. '*M*' along with his mother executed a promissory note in favour of a Chit Fund for the money owed by '*M*' to the Chit Fund. The Chit Fund filed a suit on the promissory note against '*M*' and '*V*', and applied for attachment before judgment of the money in deposit with the Commercial Finance Corporation to the credit of '*V*'. The Commercial Finance Corporation was impleaded as a garnishee. The garnishee disputed the allegation that '*V*' was still a partner of the Corporation and any money due to her was still in deposit. It was stated that '*V*' had retired from the partnership on 22nd January, 1977, that her retirement was accepted 23rd January, 1977, that her retirement had taken effect from 24th January, 1977, that her accounts were settled on 24th January, 1977, and that no amount was due

*C. R. P. No. 2908 of 1978. *10th December*, 1982.

to '*V*' from the partnership. The District Munsif found that the notice of retirement of '*V*' from the garnishee—Corporation was registered by the District Registrar only on 27th January, 1977, that the interim garnishee attachment was made even on 25th January, 1977, and therefore the subsequent retirement of '*V*' with effect from 27th January, 1977, cannot be pleaded by the garnishee—Corporation as an answer to the garnishee notice. The attachment was made absolute. An appeal against the order by the garnishee—Corporation was also dismissed. The Corporation filed the present revision. It was contended that the entry by the District Registrar was only a record of the fact of retirement, that the retirement was undoubtedly on 23rd January, 1977 when the resolution of the partnership was passed accepting the offer of retirement of *V* and that the whole basis of the order of the Courts below was misconceived.

Held: Rules 5 and 6 of the T. N. Partnership (Registration) of Partnership Rules say nothing as to whether the entry takes effect on the date when it is made or on the date with respect to which it is made. Filing of notice of retirement of a partner with the Registrar of Firms and the requirement as to the publicity to be given are significant only as regards the Firm's creditors. Likewise section 45 has reference to the partner's liability to the creditors in their character as partner of the firm and not to any personal creditors of the individual partner concerned. [*Paras*. 5, 7.]

Even if '*V*' retired only on 27th January, 1977 the order passed by the lower Courts cannot be sustained on a proper understanding of the relationship between the partner on the one hand and the money in the firm on the other. It will not be lawful for a Court to attach any money in the partnership, as if it belongs execlusively to the partner to answer for the private debts of the partner. It is true that the firm can be regarded as a debtor of the partner to a limited extent. But that debt is subject to the overriding liability of the partnership. In this sense a Court cannot rightly issue a garnishee order on the amounts standing to the credit of a partner at the instance of a personal creditor of an individual partner. [*Para*. 9.]

The provisions of Order 21, rule 46 (*A*) (read so far as the present case is concerned with Order 38, rule 5) of the Civil Procedure Code, speaks of a garnishee's liability to pay the debt to the judgment-debtor. Where there is a balance to the credit of a partner in his accounts with the firm that credit balance can be regarded as a debt owed by the firm to the partner concerned, only in a manner of speaking. From the accountant's point of view it can be regarded as a debt by the firm to the partner, that is to say, by investing the firm with a separate personality of its own as distinct from the partners composing the firm. But, if regard is to be paid, as it must be, to the circumstances that law does not fully recognise the separate personality of a firm as distinct from its partners and further, if regard is to be paid to the nature of the liability of the partners as unlimited liability towards the creditors of the firm, the mere book entry showing the firm as the debtor of the partner cannot justify invoking the provisions of Order 21, rule 46 (A) of the Code in favour of a personal creditor of a partner [*Para. 11.*]

In the application filed by the plaintiff Chit Fund for a garnishee order, it was alleged that "*V*" had no assets excepting her interest in the firm. This part of plaintiff's pleadings shows that '*V*'s interest as a partner in the firm alone could be looked to for realisation of any decree, that might be passed in the suit. Even on this footing, it seems that the only appropriate remedy for the plaintiff Chit fund is not to proceed under Order 21, rule 46 (A) read with Order 38 of the Code, but to have applied for an order under Order 21, rule 49 (A). This provision is specially meant for the holder of the decree against a partner as such to proceed against the interest of the partner in his partnership firm. According to the procedure prescribed in this rule, the creditor has got to apply to the Court passing what is called, a charging order under which the partner's interest is charged for payment towards the decree. This is usually done by the Court either by appointment of a receiver or otherwise. There is no other appropriate remedy open for a creditor of a partner to proceed against the partner's interest in the assets of the partnership. [*Para. 12.*]

The orders passed by the Court of first instance and confirmed by the appellate Court are wholly illegal and without jurisdiction and the orders are accordingly set aside. [*Para.* 13.]

Case referred to:—

Addanki Narayanappa v. *Bhaskara Krishnappa*, (1966) 2 S. C. J. 490 : (1966) 2 An. W. R. (S. C.) 60 : (1966) 2 M. L. J. (S C.) 60 : (1966) 3 S. C. R. 400 : A. I. R. 1966 S. C. 1300.

Petition under section 115 of the Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Tiruvannamalai dated 16th October, 1978, and passed in C. M. A. No. 9 of 1978 in (I. A. No. 166 of 1977 in O. S. No. 26 of 1977 dated 5th December, 1977 of District Munsif, Tiruvannamalai).

K. N. Balasubramanian, for Petitioner.

T. R. Rajaraman, for Respondent No. 1.

The Court made the following

ORDER.—Sri Maheswari Commercial Finance Corporation, Tiruvannamalai, is a registered partnership firm in which one Visalakshi Ammal, mother of Muthukrishnan, was a partner. Muthukrishnan, along with his mother Visalakshi Ammal was stated to have executed a promissory note in favour of a Chit Fund for the money owned by Muthukrishnan to that Chit Fund in the sum of Rs. 3,213 with further interest thereon. The Chit Fund filed a suit O. S. No. 26 of 1977 in the District Munsif Court, Tiruvannamalai against Muthukrishnan and his mother Visalakshiammal. The plaintiff-chit fund also filed an application for attachment before judgment of Rs. 4,000, which, according to the plaintiff-chit fund, was stated to be in deposit in Sri Maheswari Commercial Finance Corporation to the credit of Visalakshi Ammal. In that application, Sri Maheswari Commercial Finance Corporation was impleaded as a garnishee. On notice of the application for attachment, the garnishee Corporation entered appearance and filed an affidavit disputing the allegation that Visalakshiammal was still a partner of the Corporation and that any money due to her was still in deposit with that Corporation. It was stated that Visalakshiammal retired from the partnership by giving notice to the other partners on 22nd January, 1977 and her retirement was accepted on 23rd January, 1977 at the meeting of the partnership firm and her retirement took effect from 24th January, 1977. It was also stated in the affidavit of the garnishee Corporation that the accounts of Visalakshiammal in the partnership were settled even on 24th January, 1977. It was stated that by the time the Garnishee notice was served on them, the garnishee Corporation having settled the partnership accounts owed nothing to the retiring partner Visalakshiammal.

2. At the enquiry, the learned District Munsif found that the notice of retirement of Visalakshiammal from the garnishee Corporation was registered by the District Registrar only on 27th January, 1977. The learned District Munsif found that the interim garnishee attachment was made by order of the Court even on 25th January, 1977 and therefore, the subsequent retirement of Visalakshiammal with effect from 27th January, 1977 cannot be pleaded by the garnishee Corporation as an answer to the garnishee notice. In this view, the learned District Munsif overruled the objection of the garnishee Corporation to the attachment of Rs. 4,000. He accordingly made the attachment absolute.

3. The appeal by the garnishee Corporation against the decision of the District Munsif filed before the Sub-Court. Tiruvannamalai, was dismissed. Aggrieved by the findings and the conclusion of the Sub-Court in appeal, the garnishee Corporation has filed this petition under section 115 of the Code.

4. In the revision, the learned counsel for the garnishee Corporation submitted that the issue of the prohibitary order against the garnishee Corporation was without jurisdiction, or at any rate, was in irregular exercise of its jurisdiction. The learned counset submitted that the Courts below have misunderstood the nature of the entry made by the Registrar of Firms in Form-A kept by the Registrar of of Firms. It might be that Registrar of firms

had entered the retirement of Visalakshiammal from the partnership on 27th January, 1977. But according to the learned counsel, this entry merely registers in the remarks column of the registry the factum of retirement. The retirement was undoubtedly on 23rd January, 1977, when the resolution of the partner was passed accepting the offer of retirement by Visalakshiammal from the partnership. It was therefore urged by the learned counsel that the whole basis of the order of the Courts below was founded on a misconception.

5. I think, I must accept the submissions made by the learned counsel for the garnishee-firm as well founded. Rule 5 of the Tamil Nadu Partnership (Registration of Firms) Rules, 1951 provides that the register of firms shall be in Form A wherein the name of the firm and the particulars relating to the firm shall be entered. Rule 6 provides that when an entry made in the Register of Firms is to be amended, that amendment shall be shown by means of a suitable note in the remarks column provided for in the Register of Firms. These rules however say nothing about when the entry or the amended entry takes effect, whether it is on the date when the entry is made or whether it is on the date with respect to which the entry is made.

6. Learned counsel for the plaintiff-Chit Fund submitted that the retirement of Visalakshiammal must be held to take effect only on the date when the amendment entry was passed by the Registrar of Firms in the Registry. He stated that publication was necessary to protect the interest of the creditors. The learned counsel referred to section 63 (1) and section 72 of the Indian Partnership Act, 1932 and submitted that when a change occurs in the constitution of a registered firm by retirement of a partner, the retiring partner must give notice to the Registrar, on the basis of which the Registrar will make a record of the notice in the entry relating to the firm in the register of firms. Notice of retirement, learned counsel for the petitioner pointed out, must be given not only to the Registrar of Firms under section 63 of the Act, but also by publication in the official gazette and also in one vernacular newspaper circulating in the concerned district in which the firm has its principal place of business. Learned counsel referred to the findings of the Courts below that Visalakshammal did not give any public notice by publication in the District Gazette or in a vernacular newspaper as enjoined by section 72 of the Act. In any case, according to learned counsel, the retirement must be regarded as having taken place only on 27th January, 1977, when the Registrar of Firms made the entry as to the retirement of Visalakshiammal from the garnishee Corporation. Learned counsel also referred to section 45 of the Indian Partnership Act and said that even assuming that by the time the prohibitary order was received by the garnishee firm, the partner Visalakshiammal had already retired from the firm yet, she cannot be exonerated from the liability to third parties even after retirement and hence the firm has to comply with the terms of the Garnishee notice irrespective of the date of retirement of the partner.

7. I must say that the reference to the statutory provisions made by the learned counsel for the plaintiff-chit fund, have no bearing on the controversy in the present case. Filing of notice of retirement of a partner to the Registrar of Firms and the requirement as to publicity to be given for that retirement in the Gazette as well as in the local vernacular newspaper, have significance only so far as the firm's creditors are concerned. They have no significance as respects the private creditors of individual partners of the firm. Likewise, when section 45 of the Indian Partnership Act speaks of the continuing liability of a partner in the dissolved firm, the reference obviously is to the partner's liability to creditors in their character as partner of the firm. The reference is not to any personal creditors of the individual partner concerned. This is quite clear from the words of section 45 of the Act which are to the effect that the partners in a dissolved firm continue to be liable as such to third parties "for any act done by any of them which would have been an act of the firm if done before the dissolution". This section therefore cannot be applied to the case of a debt owed by a partner in his or her individual capacity to his or her own creditors as distinct from the firm's liability to the creditors of the firm.

8. The appellate Court in its order had referred to section 49 of the Indian Partnership Act and observed that even if the retirement of Visalakshiammal relates back to 25th January, 1977, still the plaintiff-chit fund was entitled to ask for a prohibitory order against the garnishee firm considering that the assets of the firm must be applied for payment of the partner's personal debt on the retirement of the partner and on accounts being taken on retirement. These reasonings of the Court below are based on the supposition that there has been a dissolution of the firm, an assumption for which, there is no support in the records. The plaintiff-chit fund did not claim that the garnishee-firm had gone into a dissolution or winding up. The only material available on the subject of retirement of Visalakshiammal from the partnership, is to be found in the counter affidavit filed by the garnishee firm. In that affidavit all that is stated is that Visalakshiammal expressed her desire to retire from the partnership and her written notice was responded to by the rest of the partners who sat in conference on 24th January, 1977. This uncontradicted statement of fact shown that the firm continued notwithstanding the retirement of Visalakshiammal as a partner of the firm. It is no doubt stated in the affidavit of the garnishee firm that Visalakshiammal's accounts, as an outgoing partner, were completely settled. Having regard to the fact that the continuing partners continued the firm, this settlement of accounts must have been effected without putting the firm to a dissolution without its business being wound up. In these circumstances, it seems to me that section 45 of the Indian Partnership Act can hardly come into play. Section 37 of the Indian Partnership Act implies that even without putting the firm to a dissolution or bringing its business to a winding up, a partner may retire and the other partners may continue the business of the firm either with or without any final settlement of accounts as between them. Section 37 of the Act expressly states that where is no final settlement of accounts on the retitement of a partner and the continuing partners carry on the business of the firm, then the outgoing partner is entitled to his share of the profits made by the firm subsequent to the retirement or at his option to payment of interest at six per cent on the amount of his share in the subsequent profit. This provision in the Partnership Act clearly shows that in the case of simple retirement of a partner without affecting the integrity or continuity of the partnership would not amount to dissolution of the firm or winding up of business. It also shows that a retiring partner's accounts can be settled otherwise than by following the procedures prescribed under Chapter VI of the Partnership Act relating to dissolution of firms.

9. I have so far dealt with the reasonings and findings of the Courts below and the contentions putforward by the parties before me in this revision. It however seems to me that the controversy in this case, has to be resolved not by asking the question whether the partner Visalakshiammal retired on 24th January, 1977, before the service of the garnishee notice on or 27th January, 1977, after the service of the garnishee notice on the firm. For, even on the basis of the findings of the Courts below that Visalakshiammal retired only on 27th January, 1977, the order passed by the Courts below cannot be sustained, on a proper understanding of the relationship between the partner on the one hand, and the money in the firm on the other. In *Addanki Narayanappa and another v. Bhaskara Krishtappa and 13 others*[1], the Supreme Court has held that during the subsistence of a partnership, no partner can say that he is entitled to any specific asset of the firm or any share therein as his, nor can a partner even claim that he is entitled to any share of all the assets of the firm. According to the Supreme Court, all that the partner is entitled during the subsistence of partnership, is to obtain his share of the profits, every year. Even when the firm gets dissolved, the partner is not entitled to any specific asset of the firm, but, on the contrary, the business of the partnership has to be wound up in a dissolution and the sale proceeds of the assets will have to be first

1. (1966) 2 S. C. J. 490: (1966) 2 An. W. R. (S. C.) 60: (1966) 2 M. L. J. (S. C.) 60: (1966) 3 S. C. R. 400: A. I. R. 1965 S. C. 1300.

applied to the creditors of the firm, then to the personal creditors of the partners, then to the personal advances made by the partners to the firm and the surplus if any, alone has to be distributed to the partners in accordance with their shares. In this view of the relationship between a partner and the assets of the partnership, both during the subsistence of the firm and at the dissolution, it will not be lawful for a Court to attach any money in the partnership, as if it belongs exclusively to the partner, to answer for the private debts of a partner. A partner might very well desist from drawing his annual share of profits and allow them to be in deposit in the firm and to the extent that undrawn profits are retained in the firm as the partner's deposits, the partner might be regarded as a creditor of the firm. Even so it is a moot question whether a third party, creditor of the partner concerned, can obtain a garnishee order and attach these monies without any further enquiry, for, it is quite likely that although the partner may have a big deposit of money in the firm, the firm itself may be indebted to its own creditors in such an amount that on winding up, nothing or very little may remain for payment to the partner towards his deposits in the firm. Since the partner's liability is based on the juridical doctrine of unlimited liability, merely because a partner's accounts with the firm is in credit, a third party creditor of the partner, cannot proceed against the amount to the partner's credit in the partnership as though there are no other overriding consideration or claims on that money. Both the Courts below and the plaintiff-chit fund had proceeded on the postulate that if a partner had a sum of money to his credit in the firm, then, that is the money which the firm owes to the partner so that, it can be the subject matter of garnishee proceedings by the partner's creditors. It is true, that the firm can be regarded as a debtor of the partner to a limited extent. But that debt is subject to the over-riding liability of the partnership to its own creditors. In this sense, a Court cannot rightly issue a garnishee order on the amounts standing to the credit of a partner merely at the instance of a personal creditor of an individual partner.

10. In this case, the counter affidavit of the garnishee firm clearly mentions that the amount which was sought to be attached by the plaintiff-chit fund was part of the very capital contribution of the partner to the partnership. The allegation is not contradicted by the plaintiff-chit fund, and this makes the present case an *a fortiori* case, Capital contributions of the partners can only be returned to them after all the creditors of the firm are paid off, and not before. In this sense, therefore, there cannot be the slightest legal basis for a valid attachment of any money standing to the credit of a partner's capital account.

11. The provisions of Order 21, rule 46 (A), (read so far as the present case is concerned with Order 38 rule 5) of the Code speaks of a garnishee's liability to pay the debt to the judgment debtor. Where there is a balance to the credit of a partner in his accounts with the firm, that credit balance can be regarded as a debt owed by the firm to the partner concerned, only in a manner of speaking. From the accountant's point of view it can be regarded as a debt by the firm to the partner. That is to say by investing the firm with a separate personality of its own as distinct from the partner's composing the firm. But, if regard is to be paid, as it must be, to the circumstance that law does not fully recognise the separate personality of a firm as distinct from its partners and further, if regard is to be paid to the nature of the liability of the partners as unlimited liability towards the creditors of the firm, then the mere book entries showing the firm as the debtor of the partner cannot justify invoking the provisions of Order 21, rule 46 (*A*) of the Code in favour of a personal creditor of a partner.

12. In the application filed by the plaintiff-chit fund for a garnishee order, it was alleged that Visalakshiammal had no assets excepting her interest in the fitm of Shri Maheswari Commercial Finance Corporation. This part of the plaintiff's pleadings shows that Visalakshiammal's interest as a partner in the firm alone could be looked to for realisation of any decree that might be passed in the suit. Even on this footing. it seems to me that the only appropriate remedy for the plaintiff-chit fund is not to proceed under Order 21, rule 46 (*A*) read with Order 38 of the Code, but to have applied, for an order under Order 21, rule 49 (*A*) Civil Procedure Code. This provision is specially meant for the holder of a decree against a partner as such

to proceed against the interest of the partner in his partnership firm. According to the procedure prescribed in this rule, the creditor has got to apply to the Court for passing of what is called, a charging order under which the partner's interest in the firm is charged for payment towards the decree. This is usually done by the Court either by appointment of receiver or otherwise. There is no other appropriate remedy open for a creditor of a partner to proceed against the partner's interest in the assets of the partnership.

13. For the reasons I have stated above, the orders passed by the Court of the first instance and confirmed by the appellate Court are wholly illegal and without jurisdiction and the orders are accordingly set aside and the application filed by the plaintiffi-chit fund is dismissed. However, there will be no order as to costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

R. Rajagopalachariar ... *Appellant**

v.

R. Venkatachalam ... *Respondent.*

(A) *Arbitration Act (X of 1940), section 34—Partnership deed clause 15 providing for reference to arbitration in case of difference of opinion—Partnership dissolved by efflux of time—Suit for dissolution and rendition of accounts by one partner—Application for stay of all further proceedings in the suit—Whether maintainable.*

(B) *Indian Partnership Act (IX af 1932), sections 42 and 47.*

The appellant, respondent and three others entered into a partnership to carry on business under the name and style of Sri Krishna & Co in accordance with the terms and conditions contained in the agreement dated 29th April, 1960. The partnership was to exist for 20 years. By efflux of time the partnership stood dissolved on 29th April, 1980, and the appellant in O. S. No. 710 of 1980 prayed for a decree of dissolution and for accounts of the dissolved firm etc,. The respondent filed I. A. No. 962 of 1980 under section 34 of the Arbitration Act for stay of all further proceedings in the suit claiming that under clause 15 of the partnership agreement all disputes and differences should be settled by arbitration only under the Act. Clause 15 stated : "கூட்டாளி-களுக்குள் ஏதாவது அபிப்பிராய பேதங்கள் ஏற்பட்டால் அவைகள் இந்தியன் ஆர்பிட்ரேஷன் ஆக்டுபடி கூடிய வரை மத்யஸ்தர்கள் மூலியமாகவே தீர்த்துக் கொள்ள வேண்டியது". The Subordinate Judge held that clause 15 applied and granted stay of all further proceedings in O. S. No. 710 of 1980. The correctness of the order was challenged in appeal.

Held.—In the instant case, the language employed in the deed does not indicate either the number of arbitrators or the manner of their appointment and does not compel the parties to have recourse to arbitration but gives them an option as it were and under those circumstances, the clause in question has necessarily to be held to be vague and invalid and cannot support an application under section 34 of the Arbitration Act. Since the existence of a valid and clear agreement to refer disputes, to arbitration is a condition precedent for invoking section 34 of the Act, the objection that this point had not been raised earlier has no substance. [*Para.* 7.]

It is seen from the plaint that the suit is one for accounts of a firm which stood dissolved by efflux of time. Under section 42 of the Partnership Act, subject to a contract between the partners (there was none in this case) a firm is dissolved if constituted for a fixed term, by the expiry of that term. Therefore, on the expiry of the period of 20 years from its formation *viz*, on 29th April, 1980, the partnership between the appellant and the respondent stood dissolved. Section 46 of the Partnership Act confers a right on every partner, on the dissolution of a firm, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus

*A. A. O. No. 249 of 1981.   1st *June*, 1982.

distributed among the partners or their representatives according to their rights. It is to work out that right this suit has been instituted by the appellant. Section 47 of the Partnership Act is in the nature of an enabling section so that the transactions and activities of a firm which is dissolved do not come to a dead stop on such dissolution but are permitted to be carried on and completed to the extent to which they may be necessary to wind up the affairs of the firm but that is not the same thing as saying that the firm continues to exist in spite of dissolution. When the right of the appellant stems from the statute, it is too much to say that clause 15 would also take in such rights as well as the subject-matter of arbitration proceedings. The plain intent of clause 15 is that during the subsistence of the firm, if any difference of opinion should arise between the parties, such difference shall be resolved as far as possible through arbitrators. Plainly this does not include the right of a party on dissolution of a firm by efflux of time to secure a decree for accounts and also for a share of the assets of the firm after the payment of liabilities. So construed, it is obvious that the nature of the dispute in this case falls outside the scope of clause 15 and therefore that clause cannot be pressed into service to say that further proceedings in the suit for accounts of a dissolved firm should be stayed on the strength of such a clause. [*Para.* 8.]

In the plaint the appellant had alleged manipulation of records and the accounts, secreting of income and profits and converting them into valuable assets. He had also prayed for the appointment of a receiver to take charge of the assets and the business of the dissolved firm. Having regard to the serious charges of dishonesty and want of good faith levelled against the respondent and the nature of the reliefs prayed for. the matter is such as not to be left to the arbitrators for a decision,

Cases referred to:—

M/s. Tomco Private Ltd. v. *T. M. S. Mani*, A. I. R. 1967 Cal. 168 ; *Union of India* v. *Kishorilal Gupta*, 1960 S. C. J. 1101 : (1960) 1 S. C. R. 493 : A. I. R, 1959 S. C. 1362 ; *Banwari Lal* v. *The Pillibhit Co-operative Development Federation Ltd*, A. I. R. 1974 All. 269 ; *Union of India* v. *M/s. Allied Construction Company*, (1980) 2 S. C. C. 215 ; *India Hosiery Works* v. *Bharat Woollen Mills Ltd.*, A. I. R. 1953 Cal 488 ; *Ganapatval Gupta* v. *Moody Brothers Ltd.*, (1950) Cal. L. J. 136 ; *G. Scammel and Nephew Ltd.* v. *H. C. and J. G. Ouston*, (1941) A. C. 251 ; *Joplin* v. *Pestlathwaita*, (1890) 61 L. T. 629.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore dated 5th March, 1981 and made in I. A. No. 9624 of 1980 in O. S. No, 710 of 1980.

T. Raghavan, for Appellant.

S. Govind Swaminathan, for *Subbaraya Iyer*, *Padmanabhan*, *Ramamani* and *K. V. Rajan*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O. S. No. 710 of 1980, Sub Court, Coimbatore, is the appellant in this Civil Miscellaneous Appeal, which is directed against the order of the Court below in I. A. No. 962 of 1980 in O. S. No. 710 of 1980 filed under section 34 of the Arbitration Act, 1940 (hereinafter referred to as the Act) for staying the further proceedings in the suit. The appellant, his brother, the respondent, P. Ramakrishnan and N. Rajn Naidu entered into an agreement dated 29th April, 1980, for the purpose of carrying on business in partnership under the name and style of Sri Krishna and Co., in accordance with the terms and conditions contained therein. It is not now in dispute that the appellant is entitled to a two anna share in the firm, its business income and assets, while, the respondent is entitled to the balance. According to the case of the appellant' the firm stood dissolved ou 29th Aprll, 1980, by efflux of time and that he is entitled to a decree winding up the affairs of the partnership and also for rendition of true and proper accounts for all the assets, movables and immovables income and profits of the firm Sri Krishna and Co., by the respondent and for payment by the respondent of the share of the appellant in all the assets, properties movables as well as immovable and also the goodwill. In I. A. No. 262 of 1980 filed under section 34 of the Act, the respondent claimed that as per clause 15 in the partnership deed dated 29th April, 1960, in case of dispute or difference of opinion, it should be settled by reference

to arbitration under the provisions of the Act and there is no right of suit available and that therefore, further proceedings in the suit should be stayed. That application was opposed by the appellant herein on the ground that the respondent was not entitled to invoke section 34 of the Act as there was no mandatory provision for arbitration in the deed of partnership compelling resort to arbitration. The appellant also further pleaded that even assuming that there was a valid arbitration clause in the partnership deed, the claim sought to be agitated in the suit did not relate to dispute or difference of opinion between the parties and therefore would not be covered by clause 15. The appellant put forth a plea that the right to secure a decree for the dissolution was available under the provisions of the Indian Partnership Act *de hors* the terms of the partnership and that the taking of the accounts of a dissolved firm cannot be properly brought within the purview of a dispute between the partners. Another objection was also raised by the appellant to the effect that the respondent cannot invoke the provisions relating to arbitration in the partnership deed dated 29th April, 1980, after the partnership itself ceased to exist by efflux of time. The appellant therefore prayed for a dismissal of the petition.

2. In an additional affidavit filed, the respondent reiterated that as per clause 15 of the partnership deed dated 29th April, 1960, disputes should be settled only by arbitration and that at all material times when the proceedings were commenced and even on the date when the application under section 34 of the Act was filed, the respondent was ready and willing to do all things necessary for the proper condut of the arbitration. The respondent also filed a reply statement to the effect that the relief claimed related to a period when the partnership was in force and disputes arose between the parties and plainly therefore, such a dispute ought to be settled only by reference to arbitration and not by the institution of a suit. The respondent further maintained that the partnership continued in spite of the dissolution of the partnership by efflux of time and that till such time as the affairs of the firm are finally wound up, it would be open to the parties thereto to rely upon the arbitration clause.

3. The learned Subordinate Judge, Coimbatore, who enquired into this application found that clause 15 in the partnership deed dated 29th April, 1960, would indicate that the parties thereto contemplated referring the matter to arbitration whenever any difference of opinion among the partners arose, that the dispute between the parties arose out of certain charges made by the appellant against the respondent touching his conduct as a partner in connection with the partnership and that therefore no ground for refusing stay as prayed for by the appellant was made out. On this conclusion, I. A. No. 962 of 1980 in O. S No. 710 of 1980 filed by the respondent herein was allowed and all further proceedings in O. S. No. 710 of 1980 were stayed. It is the correctness of this order that has been challenged in this civil miscellaneous appeal.

4. Before proceeding to deal with the contentions raised on both sides, it is necessary to notice, certain undisputed facts. The appellant, respondent and three others entered into a partnership to carry on business under the name and style of Sri Krishna and Co., in accordance with the terms and conditions contained in the agreement Exhibit B-1 dated 29th April, 1960. The partnership was to exist for a period of 20 years and the object of the partnership was to put a cinema theatre, exhibit films therein and carry on other allied or related bnsiness. The appellant is entitled to 1/8th share while the respondent is entitled to 7/8 share. By efflux of time, the partnership stood dissolved on 29th April, 1960, and the appellant in O. S. No. 710 of 1960 prayed for a decree for dissolution and for accounts of the dissolved firm. In the plaint, after setting out the terms of the partnership deed dated 29th April, 1960, the appellant has referred to the domineering role played by the respondent herein in the conduct of the business and had also charged him with not having acted in the best interest of the firm and also with having manipulated records and the accounts with a view to show loss. The main basis upon which the appellant had sought relief was that the partnership stood dissolved and that the respondent, having been in possession and management of the affairs and assets of the firm, is an accounting party bound to render an account to him and the real income and profits of the business had been secreted away by the respondent. It is also necessary

to notice that the cause of action for the suit is stated to have arisen 29th April, 1960, when the partnership was constituted and on 29th April, 1980, when the partnership stood dissolved by efflux of time.

5. In the light of the abvove claim made in the suit by the appellant and the terms of Exhibit B-1 the question that arises for consideration in this appeal is whether the Court below was justified in staying further proceedings in the suit. Mr. T. Raghavan, learned counsel far the appellant, contended that clause 15 in Exhibit B-1 does not amount to an arbitration clause at all as it is vague and indefinite and therefore, cannot be taken advantage of by the respondent for filing an application under section 34 of the Act. Elaborating this argument, the learned counsel, stated that what is contemplated by clause 15 is more than one arbitrator; but how many have to act as such has not been mentioned at all and that this would be contrary to the provisions of section 3 read with Schedule I.

6. Reliance in this connection was also placed by the learned counsel on the decision reported in *Tomco Private Limited* v. *T. M. S. Mani*[1], In addition, it was pointed out by the learned counsel for the appellant that strictly construed, clause 15 was not compelling or mandatory in that the disputes suould and must be referred to arbitration, but the language employed therein left a discretion as it were and made it permissible to refer a dispute or not and that therefore, even if clause 15 of can be construed to be an arbitration clause, it was indefinite, vague, and cannot be relied upon to sustain an application under section 34 of the Act. The learned counsel for the appellant further submitted that it is a matter for consideration and decision by Court whether a dispute is or is not within the arbitration clause and that even if it was so, ultimately, the Court has got to exercise is discretion either in granting or declining to grant stay. Reference was also made to the allegations in the plaint with reference to the fraud played by the respondent and relying on the passage in Lindley on Partnership, Fourteenth Edition at pages 240-241, it was contended that as a matter of exercise of discretion, the Court will refuse to order stay of proceedings in such cases. Attention was also drawn by the learned counsel for the appellant to section 47 of the Indian Partnership Act to contend that after the dissolution of a firm under section 42 (*a*) section 47 merely empowered the surviving partner to do certain things absolutely essential to wind up the affairs of the firm and to complete unfinished transactions; but that would not mean the partnership continued as before. It was pointed out that on the expiry of 20 years from 29th April, 1960, the partnership ceased to exist by efflux of time and clause 15, which formed part thereof, also ceased to be operative and therefore, an application under section 34 of the Act would not be maintainable by the respondent. Reference in this connection was also made to a passage at page 100 of Russell on Arbitration, Nineteeth Edition, to the effect that where, after the expiry of an agreement containing an arbitration clause, the parties continued the relation ship regulated by that agreement, the arbitration clause will be regarded as still binding, notwithstanding the absence of anything in writing to that effect and that in this case there was nothing to show that the parties continued their relationship as partners after the dissolution of the firm by efflux of time and therefore, the arbitration clause, though found in Exhibit B-1, cannot by regarded as binding. The learned counsel for the respondent Mr. S. Govinda Swaminathan, submitted that these points now raised by the learned counsel for the appellant had not been raised at all before the court below, but that clause 15 of Exhibit B-1 would constitute a valid agreement to refer disputes to arbitration including one of the nature agitated in the suit and therefore, the Court below was in order in having stayed further proceedings. Clause 15, according to the learned counsel for the respondent, should be a reference of disputes betwenn the parties to arbitration. It was further submitted that at no earlier point of time any fraud was attributed to the respondent by the appellant excepting in the plaint and therefore, merely because of such allegations in the plaint, it cannot be said that the subject-matter of the suit cannot be satisfactorily dealt with and disposed of by the arbitrators. Finally, the learned counsel for the respondent contended that even if the agreement under Exhibit B-1 dated 29th April, 1960, had expired by efflux of time, the clause relating to arbitration could still be given effect to and on that footing an application under

1. A. I. R. 1967 Cal. 168.

section 34 of the Act could also be maintained. Reliance in this connection was placed by the learned counsel for the respondent on the decisions reported in *The Union of India* v. *Kishorilal Gupta and others*[1], *Banwari Lal and others* v. *The Pillibhit Co-operative Development Federation Ltd. and others*[2] and *Union of India and others* v. *M/s. Allied Construction Company*[3].

7. In reply to these submissions, the learned counsel for the appellant, besides reiterating what has already been stated, contended that there could be no arbitration outside the provisions of the Act and that since in this case, the agreement under clause 15 of Exhibit B-1 does not conform to the requirement of the Act, there cannot be any scope for arbitration at all. Clause 15 in question in Exhibit B-1 runs as under :

கூட்டாளிகளுக்குள் ஏதாவது அபிப்பிராய பேதங்கள் ஏற்பட்டால் அவைகள் இந்தியன் ஆர்பிட்ரேஷன் ஆக்டு படி கூடிய வரை மத்யஸ்தர்கள் மூலியமாகவே தீர்த்துக் கொள்ள வேண்டியது.

This clause has to be construed strictly and if so done, does not indicate anything about the number of arbitrators or the manner of their appointment. It is evident that the word "மத்யஸ்தர்கள்" contemplates a plurality of arbitrators but then there is no incidation as to who should be appointed or whether the parties are at liberty to appoint one or more of them as such arbitrators. Under section 3 of the Act, an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. One of the implied conditions is that the reference unless otherwise expressly provided shall be to a sole arbitrator. Therefore, by its terms Exhibit B-1 has excluded a reference to a sole arbitrator, but has not made any provision for the appointment of arbitrators. Apart from this, the use of the expression "கூடியவரை" indicates that as far as possible matters may be settled by arbitration and that would mean, no obligation is cast on the parties to Exhibit B-1 to resort to arbitration for settlement of disputes. Inasmuch as the language employed in clause 15 appears to vest a discretion in the parties without in any manner indicating how that discretion has to be exercised, it is rather difficult to hold that there is a definite concluded agreement compelling parties to submit present or future differences to arbitration. It is useful in this connection to refer to the decision in *M/s. Tomco Private Ltd*, v. *T. M S. Mani*[4]. In dealing with the contention, whether the arbitration clause couched in the following terms :

> "In case of any dispute arising between the parties, the matter should be referred to the arbitrators, elected by the parties and their decision on the subject will be final."

was vague and indefinite, Sen, J., referred to the use of the expression "arbitrators" and stated that the reference was not to a single arbitrator and therefore expressed a different intention and rules out the applicability of rule 1 of the First Schedule to the Arbitration Act. Reliance was placed in this connection upon the following passage in the decision in *India Hosiery Works* v. *Bharat Woollen Mills Ltd*[2].

> "The Rule contemplates an agreement which is silent as to the number of arbitrators. If the agreement attempts to say that the appointment will be otherwise than by consent of all the parties it cannot possibly do so without making some reference to the number. It will have to say that the arbitrator or arbitrators will be appointed by one or some of the parties or by a third party and as soon as it does so, it will be outside the Rule. If it speaks of the appointment of "the arbitrator" there will be no scope for the application of the Rule because a single arbitrator will be indicated by the agreement itself. If it speaks of the appointment of "arbitrators", then also it will be "otherwise expressly provided" that there will not be a sole arbitrator. The only type of agreement which can come under the Rule is. therefore an agreement which speaks expressly of arbitration by consent of the

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1. 1960 S. C. J. 1110 : (1960) 1 S. C. R. 493 : A. I. R. 1959 S. C. 1362, 1370.
2. A. I. R. 1974 All. 269.
3. (1980) 2 S. C. C. 215.

1. A. I. R. 1967 Cal. 168.
2. A. I. R. 1953 Cal. 488.

> parties in which case there is no reference to the number of arbitrators or an agreement which says nothing about the mode of appointment in which consent of all the parties will be a necessary implied condition".

After referring to the above passage, Sen, J., noticed the decision in *Ganapatlal Gupta* v. *Moody Brothers Ltd*[1]., to the effect that arbitration agreements should be strictly construed and clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes. The observations of Viscount Maugham in *G. Scammel and Nephew Ltd.*, v. *H. C. and J. G. Ouston*[2], to the following effect were also noticed :

> "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable decree of certainty. It is plain that unless this can be done, it would be impossible to hold that the contracting parties had the same intention; in other words, the consensus *ad item* would be a matter of mere conjecture."

Lord Wright observed thus :

> "....But the test of intention is to be founded in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract."

In the instant case, also the language employed does not indicate either the number of arbitrators or the manner of their appointment and does not compel the parties to have recourse to arbitration but gives them an option as it were and under those circumstances, the clause in question has necessarily to be held to be vague and invalid and cannot support an application under section 34 of the Act. It may be that this point was not put forth by the appellant in the manner now done before this Court. But since the existence of a valid and clear agreement to refer disputes; to arbitration is a condition precedent for invoking section 34 of the Act, the objection raised by the learned counsel for the respondent that this point had not been raised earlier has no substance.

8. The next question that arises for consideration is whether the legal proceedings commenced by the appellant is in respect of a matter agreed to be referred to arbitration. In other words, the main aspects of the question are what is the dispute that has arisen and what is the dispute referred to in the arbitration clause. It is seen from the plaint filed that the suit is one for accounts of a firm which stood dissolved by efflux of time. Under section 42 of the Partnership Act, subject to a contract between the partners (there is none in this case), a firm is dissolved if constituted for a fixed term, by the expiry of that term. Therefore, on the expiry of the period of 20 years *viz.*, on 29th April, 1980, the partnership between the appellant and the respondent stood dissolved. Section 46 of the Partnership Act confers a right on every partner, on the dissolution of a firm, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their epresentatives according to their rights. It is to work out this right that the suit has been instituted by the appellant. Section 47 of the Partnership Act is in the nature of an enabling section so that the transactions and activities of a firm which is dissolved do not come to a dead stop on such dissolution but are permitted to be carried on and completed to the extent to which that may be necessary to wind up the affairs of the firm; but that is not the same thing as saying that the firm continues to exist in spite of dissolution. When the right of the appellant thus stems from the statute, it is too much to say that clause 15 would also take in such rights as well as the subject-matter of arbitration proceedings. In other words, the plain intendment of clause 15 is that during the subsistence of the firm, if any differences of opinion should arise between the partners, then such differences shall be resolved as far as possible through arbitrators. Plainly, this does not include the right of a party on dissolution of a firm by efflux of time to secure a decree for accounts and

1. (1950) 85 Cal. L. J. 136.
2. (1941) A. C. 251.

also for a share of the assets of the firm after the payment of its liabilities. So construed, it is obvious that the nature of the dispute in this case falls outside the scope of clause 15 and therefore, that clause cannot be pressed into service by the respondent to say that further proceedings in the suit for accounts of a dissolved firm should be stayed on the strength of such a clause.

9. In the view that the dispute in the present case is outside the scope of clause 15 in Exhibit B-1 even assuming that such a clause is valid, it is wholly unnecessary to consider the other question whether in spite of the dissolution of the partnership by efflux of time, the clause relating to arbitration will have any separate or independent existence.

10. There is one other matter which may now be adverted to. In the plaint, the appellant had stated that the respondent had not acted in the best interest of the partnership and had manipulated records and the accounts and had also secreted the income and profits and converted them into valuable assets. Apart from praying for a decree for rendition of accounts and for payment of the amounts found due on such account-taking, the appellant had also prayed for the appointment of a Receiver to take charge of the assets and the business of the dissolved firm. In the light of the serious charges of dishonesty and want of good faith levelled against the respondent and the nature of the reliefs prayed for, the matter is such as not to be left to arbitrators for a decision. In Halsbury's Laws of England, Volume 35, paragraph 172, the law is stated as under :

> "......A stay of proceedings will usually be refused if charges of fraud or dishonesty or of want of good faith are made in good faith by one partner against the other, or if questions of law are likely to arise which are more fit for the Court than a lay tribunal, or if the action claims dissolution on a ground expressly within the discretion of the Court or if the attempted reference is made vexatiously."

Similarly, in Russell on Arbitration, nineteenth edition, at page 208, it has been stated as follows :

> "However, the Court has a discretion to refuse a stay. This discretion must be exercised upon the facts involved, but when a dissolution is claimed, the facts involved are very apt to be such as to call for refusal. This had led to the opinion of the Court in *Joplin* v. *Posblathwaita*[1], that a question of dissolution was not a suitable one to be left to arbitrators to decide".

The reliefs prayed for and the circumstances under which the appellant was obliged to pray for those reliefs are so apt as to justify the refusal of stay under section 34 of the Act as prayed for by the respondent. The Court below was therefore in error in proceeding to stay further proceedings in the suit on the ground that there was a valid agreement to refer the disputes to arbitration and also that the disputes in this case would fall within the scope of clause 15 in Exhibit B-1. Under those circumstances, the order of the Court below cannot he sustained. The result is, the civil miscellaneous appeal is allowed with costs.

R. S. —— *Appeal allowed.*

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1. (1890) 61 L.T. 629.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*S. Padmanabaan, J.*

Autonomus St. Joseph's College Society represented by its President and provincial Rev. Fr. M. Jeyaraj, S. J. Tiruchirapalli ... *Petitioner**

v.

The Director of Collegiate Education, Madras-6 and another ... *Respondents.*

Constitution of India (1950), Article 30 (1)—St. Joseph's College, a minority institution entitled to protection — G. O. Ms. No. 675, Education, dated 26th April, 1979 providing for utilisation of surplus teaching staff due to shedding of P. U. C. from 1979-80—Director of Collegiate Education empowered to shift staff from one aided college to another—Autonomous St. Joseph's College, if can appoint qualified teachers in vacancies without prior approval of Government—Impugned Government order, held inapplicable.

Held: The impugned Government Order practically embodies the same provision as section 26 of the Tamil Nadu Recognised Private Schools Regulation Act, 1973, which was struck down as being violative of the right of minority institutions to establish and administer the educational institution of their choice under Article 30 (1) of the Constitution. It is not the case here that the College is not appointing qualified teachers or not keeping standards prescribed by the University. In these circumstances the impugned Government order shall not apply to the petitioner-College.

[*Para* 8 *and* 13.]

Cases referred to:—

State of Kerala v. *Cor. Management of Schools*, (1979) Ker. L. T. 232; *Kerala Education Bill*, In re, 1959 S. C. J. 321 : 1959 S. C. R. 995 : 1958 K. L. T. 465 : A I. R. 1958 S. C. 956; *A. M. Patroni* v. *Assistant Educational Officer*, 1974 K. L. T. 78 : A. I. R. 1974 Ker. 197; *Ahmedabad St. Xavier's College* v. *State of Gujarat*, (1974) 1 S. C. C. 717 : A. I. R. 1974 S. C. 1389; *Rev. Br. A. Thomas* v. *Deputy Inspector of Schools*, (1975) 1 M. L. J. 353 : 88 L. W. 791: A. I. R. 1976 Mad. 214; *All Saints High School* v. *Government of Andhra Pradesh*, (1980) 2 S. C. J. 273 : (1980) 2 S. C. C. 478 : A. I. R. 1980 S. C. 1042.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to G. O. Ms. No. 675, Eduction, dated 26th April, 1979 of the second respondent and quash the same in so far as the petitioner, Autonomous St. Joseph's College, Tiruchirnpalli, is concerned and direct the respondents to approve all the appointments made by the petitioner in its Autonomous St. Joseph's College Tiruchirappalli with all the benefits due the posts from the date of appointment.

T. Martin, for Petitioner.

M. A. Sadanand, for Government Pleaders for Respondents.

The Court made the following

ORDER.—The Autonomous St. Josephs College, Tiruchirapalli is the petitioner. The prayer in the writ petition is to issue a writ of *certiorarified mandamus* to quash G. O. Ms. No. 675, Education, dated 26th April, 1979 issued by the second respondent, Government of Tamil Nadu in so far as the petitioner/college is concerned and to issue a writ of *mandamus* to the respondents compelling them to approve all the appointments made by the petitioner in its college.

2. It is not disputed that the college is a minority institution which is entitled to the protection of Article 30 (1) of the Constitution of India. G. O. Ms. No. 673, Education, dated 29th April, 1979 has been issued by the Government providing for a detailed scheme for the utilisation of surplus teaching staff in colleges (Government and Aided) consequent on the shedding of Pre-University Course (P. U. C.) from 1979-80. It is well-known that with effect from 1979-80 the P. U. C. classes were abolished and were substituted

*W. P. No. 3868 of 1981. *22nd February, 1983.*

by Plus Two courses started in Higher Secondary schools. Naturally, therefore, many teachers from various colleges, both Government and Aided, got retrenched and in order to enable the utilisation of such retrenched teaching staff, the Government issued G. O. Ms. No. 675, Education, dated 26th April, 1979. It is sufficient to refer to two paragraphs from the said Government Order. Sub-paragraph (5) of paragraph 2 states that the Director of Collegiate Education is also authorised to shift in consultation with the aided Colleges concerned where necessary surplus staff from one aided College to another aided college or from aided College to Government colleges. Paragraph 4 of the Government Order reads as follows :

> "The staff rendered surplus after redeployment as detailed above will be treated as supernumerary and the Director of Collegiate Education will maintain a list of such persons in respect of each college. These persons will be gradually absorbed against vacancies caused on account of retirement, death, resignation, etc., without getting the prior approval of the Government until further orders."

In other words, the effect of the Government Order is that after the date of the Government Order all the aided colleges should fill the vacancies caused on account of retirement, death, resignation, etc., of the teaching staff only from the staff, members who had been retrenched from various colleges, Government and Aided, by reason of the shedding of P. U. C. Classes and the colleges are not allowed to appoint any new staff-member without getting the prior approval of the Government until further orders.

3. Mr. T., Martin, learned counsel for the petitioner states that the petitioner college is a minority educational institution, which is entitled to the protection of Article 80 of the Constitution of India. If that be so, no restriction can be placed on the power of the college to appoint its own teaching staff. All that the Government can regulate is to see that these minority educational institutions keep to the standards prescribed by the University and appoint staff who possess the prescribed educational qualifications. Then the Government cannot interfere in any manner with the appointment of teaching staff in such minority educational institutions without violating Article 30 (1) of the Constitution of India. According to Mr. T. Martin, the substance of the Government Order was put in the form of section 26 in the Tamil Nadu Recognised Private Schools Regulation Act, 1973. The validity of the said Act came up for consideration before a Bench of this Court and this Court struck down the said provision since it violated Article 30 (1) of the Constitution of India, in so far as the rights of the minority educational institutions are concerned. In the circumstances, Mr. T. Martin argues that the Government Order has to be quashed so far as this petitioner college is concerned.

4. Notwithstanding Article 30 (1) of the Constitution of India and various other citations made by Mr. T. Martin, Mr. Sadanand, learned Government Advocate, makes a valiant effort to sustain the Government Order on the ground that by virtue of the shedding of the P. U. C. Classes with effect from 1979-80 a number of members of the teaching staff became unemployed and all that the Government have done by the impugned Government Order is only to see that the private colleges recruit the said surplus staff to fill up the vacancies caused by retirement, death or resignation from the Pool.

5. The question is, whether the contentoni urged by the learned counsel for the petitioner is correct.

6. Article 30 (1) of the Constitution of India reads thus :

Right of minorities to establish educational institutions.—Clause (1) implies the right to a minority community to impart instruction to the children of its own community in institutions run by it and in its own language and if such right is infringed, an institution run by the community may seek relief for violation of the fundamental right. It confers the right on a minority to establish and administer the educational institution of their choice.

7. The applicability or Article 30 (1) in relation to the Tamil Nadu Recognised Private

Schools Regulation Act, 1973, came up for consideration before this Court in W. P. No. 4478 of 1974 and batch of cases. Section 26 of the said Act reads as follows :

Absorption of teachers or other persons on retrenchment.—Where any retrenchment of any teacher or other persons employed in any private school is rendered necessary consequent on any order of the Government relating to education or course of instruction or to any other matter, it shall be competent for the Government or the school committee of any private school to appoint such teacher or other person in any school or institution maintained by the Government or in such private school, as the case may be.

In these writ petitions and other connected cases, apart from section 26, some of the other sections were also attacked on the ground that they violated the right of minority institution to establish and administer the educational institutions of their choice under Article 30 (1). Dealing with section 26 of the Act, the Division Bench has observed thus :

"We are of opinion that sub-section (2) of section 21, sections 22 to 25 as also rules 17 and 18 are in abrogation of the right to administer a minority school and violate Article 30 (1). So also section 26, we think, offends Article 30 (1) which provides for absorption by a private school of a teacher or other employee retrenched elsewhere."

As rightly pointed out by Mr. Martin, the impugned Government Order pratically embodies the same provision that was struck down by this Court, *viz.*, section 26 of the Tamil Nadu Recognised Private Schools Regulation Act, 1973.

8. Mr. Martin has referred me to certain decisions and though they are not strictly necessary for the purpose of deciding the controversy, it is but fair that I should refer to them. In *State of Kerala* v. *Cor. Management of Schools*[1], the scope of the minority communities under Article 30 of the Constitution of India to establish and administer educational institutions arose for consideration. A Government Order issued under the Kerala Education Act, 1958 provided that whenever a vacancy occurred in an aided school the Managers should follow the directions issued by the Government from time to time for ascertaining the availability of qualified hands for appointment as teachers. As per the existing orders the Managers had to advertise vacancies of teachers in the prescribed form and in the approved dailies in two consecutive issues. Section 11 of the Kerala Education Act, 1958 stated that subject to the rules and conditions laid down by the Government, teachers of aided schools should be appointed by the Managers of such schools from among persons who possessed the qualifications prescribed under section 16. The validity of these provisions was challenged before the Kerala High Court. The Bench of the Kerala High Court speaking through Madhavan Nair, J. observed as follows:—

"That freedom (fundamental freedom) is, as pointed out in In re *Kerala Education Bill*[1], to establish and administer educational institutions that may conserve the community's religion, language or culture and also give a good general education to their children. To serve such double purpose, the management must have considerable freedom of choice of teachers to be employed in their schools. If the management is compelled to appoint qualified teachers, irrespective of their express aversion for their religion and culture of the community that has established the school, "the right guaranteed by Article 30 (1) will be but a 'teasing illusion', a promise of unreality."

9. In *A. M. Patroni* v. *Assistant Educational Officer*[2], a learned Judge of the Kerala High Court while referring to Rules 44 and 45 of Chapter XIV-A of the Kerala Education Rules framed under the Kerala Education Act has observed as follows:—

"These rules 44 and 45 are not rules fixing the qualification for being appointed as the Headmaster. No doubt, even if the intitution is protected under Article 30, the

1. (1970) K. L. T. 232.

1. 1959 S. C. J. 321 : 1959 S. C. R. 995: (1958) K. L. T. 465 : A. I. R. 1958 S. C. 956, 939.
2. (1974) K. L. J. 78 . A. I. R. 1974 Ker. 197.

State can make laws regulating the appointment of teachers in the interests of the school. But the regulation must be limited to the qualifications that a teacher must possess and to the experience which he should have to discharge the duties in the school. Rules 44 and 45 do not relate to these two requirements."

After referring to various decisions, the learned Judge again observes as follows:—

"·n the latter two cases the question directly arose whether the minority community had the freedom to appoint a Headmaster of a school or Principal of a College and in dealing with that question it has been recognised by this Court and the Supreme Court that the position of a Headmaster or a Principal is a vital matter from the point of view of administration of the institution. Provisions which in any way interfere with that freedom are stated to be violative of Article 30 of the Constitution. The management has the freedom to choose the person competent and qualified and to appoint him or her in the institution."

10. In *St. Xavier's College* v. *State of Gujarat*[1], the Supreme Court has observed as follows:—

"Another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teacher or its disciplinary control over teacher and other members of the staff of the institution is void as being violative of Article 30 (1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of these teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30 (1)."

1. (1974) 1 S.C.C. 717: A. I. R. 1974 S. C. 1389 at 1426.

In fact in the same case, the Supreme Court has approved the decision of the Kerala High Court, reported in *State of Kerala* v. *Cor. Management of Schools*[1].

11. The next case to be referred to is the one reported in *Rev. Br. A. Thomas* v. *Dy Inspector of Schools*[2]. There it was attempted to argue on behalf of the educational authorities that since the Government gave aid to minority educational institutions it could insist on teaching staff of their choice being appointed. The argument was rejected by Veeraswami, CJ., speaking for the Bench. The learned Chief Justice observed thus :

"The learned Government Pleader stenuously contends that, though the petitioner-institution is a protected institution, inas much as it received aid from the Government, and as all the teachers whether they are in protected or unprotected institutions are paid, by the Government through the aid the Government have a right, in order to do social justice inasmuch as it has to provide employment for the higher grade teachers, to tell the institution that it should not employ a secondary grade teacher in higher grade vacancies. We are unable to accept this contention as far it relates to protected institutions. *The Ahmedabad* St. *Xavier's College Society* v. *State of Gujarat*[3], as well as earlier decisions go a long a way to recognise the freedom of management on the part of denominational institutions and the management includes also appointment of teachers of their choice. It is not necessary to say more than this in this case. Here it happens to be a case of employment of more qualified teachers in the interests of higher standards of education and the Education Department cannot insist that that should not be done by the institution. This has nothing to do with the aid given. The aid given by the Government does not clothe the Govenment with any right of the type they have claimed to interfere with the freedom of management of the institution to employ teachers of their choice, who

1. 1970 K. L. T. 232.
2. (1975) 1 M. L. J. 353 : 88 L. W. 791 : A. I. R. 1975 Mad. 214.
3. (1974) 1 S. C.C. 717 : A. I. R. 1974 S. C. 1389.

have a higher qualification than that prescribed by the Department."

12. From these decisions it is clear, if I may say so, with respect that they have given the correct answer to the argument of Mr. Sadanand that teaching staff got retrenched on account of the abolition of P. U. C. classes and social justice requires that in order that those unemployed teachers may be employed, such a restriction can be placed on the right of the minority institutions to appoint teachers of their choice. The same principles have been affirmed again in *All Saints High School* v. *Government of Andhra Pradesh and others*[1].

13. It is not the case here that the college is not appointing qualified teachers or not keeping to the standards prescribed by the University. In the circumstances, I hold that the impugned Government Order shall not apply to the petitioner/college. A writ as prayed for will issue. The writ petition is allowed. No costs.

R. S. —— *Petition allowed.*

1. (1980) 2 S. C. J. 273 : (1980) 2 S. C. C. 478 : A.I.R. 1980 S. C. 1642.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P R. Gokulakrishnan and S. Nainar Sundaram, JJ.*

Brindha Muthuswamy ... *Appellant**

v.

The Tamil Nadu Small Industries Development Corporation Ltd., by its Manager, Industrial Estate and two others ... *Respondents.*

(A) *Tamil Nadu Public Premises (Eviction sof Unauthorised Occupants) Act (I of 1976), ecton 4, 5 and 6—Scope ana applicability.*

(B) *Constitution of India, (1950), Article 226—Writ petition against Tamil Nadu Small Industries Development Corporation Ltd, maintainable.*

Notice was issued to the appellant as per rule 3 of the Rules, under From 'A' calling upon her to show cause on or before ten days of the date of the issue of the notice as to way an order of eviction should not be made under sub-section (1) of section 4 of the Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Act, 1976 (Tamil Nadu Act I of 1976). To this notice the appellant sent a reply alleging that her tenancy had been regularised, that she was in occupation after regularising her occupation and that the authorities must drop the proceedings against her. She had also requested for a personal hearing to reprsent her case. Subsequent to this reply, a notice was issued under Form 'B' as per rule 4 of the Rules intimating the appellant that an enquiry will be held and directing her to attend the enquiry and produce evidence. Accdoringly the enquiry was conducted and the report as to the state of affairs as on that day was recorded Subsequently a notice as per Form 'C' prescribed under rule 6 of the Rules was issued. This notice was questioned in the

*W. A. No. 44 of 1983. 1st *March*, 1983.

writ petition which was dismissed as not maintainable. On appeal.

Held: In view of the decision reported in the *General Manager, United India Fire and General Insurance Company Ltd.* v. *A. A. Nathan*, 1981 Lab. I. C. 1076 : (1980) 1 Lab. L. J. 369, the writ petition is maintainable. There is nothing in section 5 of the Act which refers to the notice contemplated under rule 6 of the Rules. On the other hand section 5 of the Act is clear and categoric to the effect that if after the issue of notice under section 4 of the Act and after giving a reasonable opportunity of being hard, the estate officer is satisfied that the premises was unauthorisidely occupied, he may make an order of eviction for reasons to be recorded therein. It is only subsequent to the order of eviction and taking possession under sub-section (5) of the Act, the disposal of the property left on the public premises by unauthorised occupants arises. Section (5) of the Act definitely contemplates: (1) notice under section 4 of the Act, (2) recording of evidence that may be produced in support of the notice under section 4 of the Act, (3) giving reasonable opportunity to the unauthorised occupants to represent their cases, (4) The Estate Officer must be satisfied that the public premises in question is unauthorisedly occupied, (5). The Estate Officer afterwards must make an order of eviction, (6) Such an order of eviction must be supported by reason, (7) The order must direct the unauthorised occupant to vacate the premises on some date as may be specified in that order, and (8) The copy of the said order has to be affixed on the outer-door or in some other conspicuous part of the public premises in question. When all these requirements are satisfied it will be deemed that a proper order under section 5 of the Act has been passed. If such an order is passed, the affected party has an opportunity of filing an appeal to the Appellate Authority of the District in which the public premises is situated or such other judicial officer in that district of not less than such years standing as may be prescribed and as the District Judge may designate in this behalf. It is seen that a substantial right is conferred upon the unauthorised occupant against whom orders of eviction are passed to prefer an appeal. Section 5 of the Act also casts duties upon the second respondent before invoking section 6 of the Act. It is not stated that before the impugned notice, any order of eviction should have been passed, and any proceedings taken for securing possession. When a substantial right has been given to a party by the provisions of an enactment, the authorities concerned cannot ignore the same and invoke the provision which arises only subsequent to the order of lawful eviction that has to be passed under section 5 of the Act. Even if there is a mistake in the Rule by stating that Form 'C' is for section 5 (1) of the Act that will not absolve the authorities concerned from passing an order of eviction as contemplated under section 5 of the Act. The impugned notice is quashed. [*Para. 8.*]

Cases referred to:

The General Manager, United India Fire and General Insurance Company Ltd. v. *A. A. Nathan*, (1981) Lab. I. C. 1076 : 1981 1 Lab. L. J. 369 ; *R. Eucharista* v *State of Tamil Nadu*, (1980) 2 L. L. J. 363.

N. V. Balasubramaniam, for Appellant.

V. T. Arasan, for Respondents Nos. 1 and 2.

S. Govind Swaminathan, for Respondent No. 3.

The Judgment of the Court was delivered by

Gokulakrishnan, J.—The petitioner in Writ Petition No. 3875 of 1985 is the appellant herein. She has filed the said writ petition for issue of a writ of *certiorari* or other a appropriate writ or direction in order to quash the notice issued by the development officer, SIDCO, Industrial Estate, Guindy (second Respondent) dated 12th May, 1981 under the Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Rules, 1978 (herein after referred to as the Rules).

2. The short facts for the purpose of this case are as follows—According to the appellant, she was occupying No. C. 52 Industrial Estate, Guindy, for the purpose of her business as and from 1st January, 1977. It is unnecessary for us to deal with the proceedings of the second respondent for the recovery of arrears from the appellant and also the proceedings of the bank against the appellant and others to recover its dues. The

second respondent as per rule 3 of the Rules, issued a notice under Form A to the appellant calling upon her to show cause on or before ten days of the date of issue of this notice as to why an order of eviction should not be made under sub-section (1) of section 4 of the Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Act 1975. (Tamil Nadu Act I of 1975) (hereinafter referred to as the Act. To this notice, the appellant sent a reply alleging that her tenancy has been regularised, that she is in occupation after regularising her occupation and that the authorities must drop the proceedings against her. She has also requested for a personal hearing to represent her case. Subsequent to this reply, the second respondent issued notice under Form 'B' as per rule 4 of the Rules intimating the appellant that an enquiry will be held at 11-00 A. M. on 30th April, 1981. at the Industrial Estate, Guindy and directing her to attend the enquiry and produce any evidence, oral or recorded, in support of her claim. On 4th May, 1981 at 3-00 P M the enquiry was conducted and the report as to the state of affiars as on that date was recorded by the second respondent. Subsequently, the second respondent issued notice as per Form 'C' prescribed under rule 6 of the Rules. In that notice it is stated as follows :

> "Whereas possession of the premises described hereunder which is the property of the Government Authority has been taken from you in pursuance of the eviction proceedings taken under sub-section (1) of section 5 of the Tamil Nadu Public Premises (Eviction of Unauthorised Occupants) Act, 1975 (Tamil Nadu Act I of 1975), you are hereby required to remove or cause to be removed, the property of the description mentioned below remaining on the premises, within fourteen days from the date of service of the notice in default of which, action will be taken to remove and dispose it of in public auction".

In that notice, the description of the Factory unit in the possession of the appellant has been given. It is this notice that was questioned in W. P. No. 3875 of 1981. The learned single Judge of this Court dismissed the writ petition by passing the following order :

> "I have already held in W. P. No. 3998 of 1978 that no writ will lie against the first respondent, the Tamil Nadu Small Industries Development Corporation Limited Madras. In view of this, the writ petition is dismissed. No costs."

It is as against this order. The present writ appeal has been filed.

3. Mr. N. V. Balasubramanian, learned counsel appearing for the appeallant submitted that the writ petition is maintainable in view of the decision rendered by a Bench of this Court in *General Manager, United India Fire and General Insurance Co. Limited* v. *A. A. Nathan*[1]. The learned counsel also points out that the decision rendered by a single Judge of this Court in *R. Eucharists* v. *State of Tamil Nadu*[2], will support his contention. It is further submitted, that inasmuch as an order under section 5 of the Act has not been passed by the Officer concerned, the impugned notice is wholly incompetent. He also submitted that the third respondent, who is the subsequent allottee of the Unit by name M/s. Data Coatings, Madras, is not a proper party to added.

4. As against this argument, Mr. V. T. Arasan, learned counsel appearing for respondents 1 and 2 submitted that the notice in Form 'C' which is questioned in the writ proceedings, is the notice that is contemplated under section 5 of the Act and as such, that notice issued in Form 'C' is competent and valid. He further submitted that Form 'C' notice issued as per the Rules is for passing an order under section 5 of the Act.

5. Mr. S. Govind Swaminathan, learned counsel appearing for the Third respondent, also submitted that Form 'C' notice was only under section 5 (1) of the Act and that must be equated to the order of eviction contemplated under section (5) (1) of the Act.

6. Mr. N. V. Balasubramanian, learned counsel for the appellant in reply submitted

1. (1980) 1 Lab. L. J. 369 : 1981 Lab. I. C. 1076.
2. (1980) 2 L. L. J. 363.

that without an order under section 5 of the Act, the authority should not have jumped from section 4 to section 6 of the Act and as such, the notice, which actually must be deemed as a notice under section 6, has to be quashed.

7. Inasmuch as the learned single Judge of this Court had disposed of the matter only on the ground that the writ petition is not maintainable against respondents 1 and 2, he had not adverted to the competency of the notice questioned by the appellant herein. It has been brought to our notice by the learned counsel appearing for appellant and also conceded by the learned counsel appearing for the respective respondents herein that the Bench decision in *The General Manager, United India Fire and General Insurance Co. Ltd.*, v. *A. S. Nathan*[1], clearly establishes that the writ will lie against respondents 1 and 2. Hence, we hold that the appellant's writ petition is maintainable as against respondents 1 and 2.

8. Section 4 of the Act contemplates issue of notices to show cause against an order of eviction. By Form 'A', respondents 1 and 2 called upon the appellant as to why an order of eviction should not be made under sub-section (1) of section 4 of the Act. For the said notice, the appellant has sent a reply dated 15th April, 1981, alleging that her tenancy has been regularised, that she has paid rent for the Unit from 24th July, 1980 to March, 1981, at the rate of Rs. 636 per month, that the allegation that the appellant is in unauthorised occupation of the premises C-52, Industrial Unit, is unfounded and arrived at without materials and reasons, and that the proposed action against the appellant has to be dropped. In that reply, the appellant has also asked for a personal hearing. Subsequent to this reply, the second respondent issued a notice under Form 'B' as per rule 4 of the Rules initimating the appellant that one S. Subbiah, Estate Officer Development Officer, Industrial Estate, Guindy will hold an enquiry at 11-00 A. M. on 30th April, 1981 at the office of the Development Officer, Industrial Estate, Guindy, Madras-32, that the appellant has to attend at the place named above and that she may produce any evidence, oral or recorded in support of her claim. There was an enquiry on 4th May, 1981 at about 3-00 P. M. by the second respondent and he has recorded the factum of the enquiry. Subsequently the impunged notice was issued under Form 'C'. We are not able to see any order of eviction as such passed by the second respondent or any other competent authority within the meaning of section 5 of the Act. Form 'C' was issued in pursuance of rule 6 of the Rules. Rule 6 of the Rules reads as follows:

> "6. *Notice for the disposal of property remaining in the premises*—(1) The notice referred to in sub-section (1) of section 5 shall be in Form C.
>
> (2) The notice shall be served by delivering a copy to the person or person from whom the possession of public premises has been taken or to any adult male member of the family at his usual place of abode or to his authorished agent, or by affixing a copy thereof on some conspicuous part of his known place of residence or on some conspicuous part of the permises evicted.
>
> (3) A copy of the notice shall also be published by beat of tom tom, by affixing on the notice board of the village chavadi or in any other public place such as the village temple, mosque or church, village school or in the notice board of the office of the Collector or Revenue Divisional Officer, Taluk Tahsildar or Deputy Tahsildar, Village or Town Panchayat, Panchayat Union or City Municipality Corporation, as the case may be".

It is clear from rule 6 of the Rules that this rule is intended for giving notice for the disposal of property remaining in the premises. Rule 6 (1) of the Rules states that the notice referred to in sub-section (1) of section 5 shall be in Form C. That is why Mr. V. T. Arasan and Mr. S. Govind Swaminathan, learned counsel appearing for the respective respondents submitted that the

1. (1981) Lab. I. C. 1076 : (1980) 1 Lab. L. J. 369.

notice under Form 'C' issued is in effect the order of eviction contemplated under section 5 of the Act. Section 6 of the Act deals with disposal of property left on public premises by unauthorised occupants. Rule 6 of the Rules, which specifies form 'C' also states that Form 'C' notice is for the disposal of property remaining in the premises.

Section 5 of the Act reads as follows:—

"5 *Eviction of unauthorised occupants.*—(1) If after considering the cause, if any shown by any person in pursuance of a notice under section 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the estate officer may make an order of eviction, for reasons to be recorded therein directing that the public premises shall be vacated on such date as may be specified in the order by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction under sub-section (1) the estate officer or any other officer duly authorised by the estate officer in this behalf may evict that person from and take possession of the public premises and may, for that purpose, use such force as may be necessary".

There is nothing in section 5 of the Act which refers to the notice contemplated under rule 6 of the Rules. On the other hand, the above section is clear and categoric to the effect that after the notice under section 4 of the Act and after giving the party concerned a reasonable opportunity of being heard, the Estate Officer, if satisfied that the premises is unauthorisedly occupied, may make an order of eviction for reasons to be recorded therein. It is only subsequent to the order of eviction and taking possession under sub-section 2 of section 5 of the Act, the disposal of the property left on public premises by unauthorised occupants arises. Section 5 of the Act definitely contemplates (1) notice under section 4 of the Act ; (2) recording of evidence that may be produced in support of the notice under section 4 of the Act; (3) giving reasonable opportunity to the unauthorised occupant to represent the case; (4) The Estate Officer must be satisfied that the public premises is unauthorisedly occupied (5) The Estate Officer afterwards has to make an order of eviction; (6) such an order of eviction must be supported by reasons ; (7) that order must direct the unauthorised occupier to vacate the premises on such date as may be specified in that order and (8) the copy of the said order has to be affixed on the outer or in some other conspicuous part of the public premises in question When all these requirements are satisfied, it will be deemed that a proper order under section 5 of the Act has been passed. If such an order is passed the affected party has an opportunity of filing an appeal to the Appellate Authority of the district in which the Public Premises is situated or such other Judicial Officer in that district of not less than such years standing as may be prescribed and as the District Judge may designate in this behalf. Section 9 of the Act reads as follows:—

"*Appeals.*—(1) An appeal shall lie from every order of the Estate Officer made in respect of any public premises under section 5 or section 7 to an appellate Officer who shall be the district Judge of the district in which the public premises are situated or such other judicial Officer in that district of not less than such number of years standing as may be prescribed and as the district Judge may designate in this behalf.

(2) An appeal under sub-section (2) shall be preferred within such period as may be prescribed.

Rest of the section is not reproduced as unnecessary for the purpose of this case Thus, we are able to see that a substantial right is conferred upon the unauthorised occupant against whom orders of eviction are passed to prefer an appeal. Section 5 of the Act also cast duties upon the second respondent before invoking section 6 of the Act. It is not stated before us that before the impugned notice, any order of eviction has been passed, and any proceedings taken for securing possession. When a substantial right has been given to a party by the provisions of an enactment, the authorities concerned cannot ignore the same and invoke the provision which arises only subsequent to the

order of lawful eviction that has to be passed under section 5 of the Act. Even if there is a mistake in the rule by stating that Form 'C' is for section 5 (1) of the Act, that will not absolve the authorities concerned from passing an order of eviction as contemplated under section 5 of the Act.

9. For all these reason the impunged notice is quashed with the result, the writ appeal is allowed, No costs. It is made clear that the authorities concerned can proceed to make an appropriate order of eviction pursuant to the enquiry already held.

R. S. —— *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*K. B. N. Singh, CJ. and Sathiadev, J.*

The Workmen, Employed in Engine Valves Ltd., Madras, represented by the Secretary, Engine Valves Employees Union, Madras-16. ... *Appellant**

v.

The Management of Engine Valves Ltd., Madras-16 and another .... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 11-A—Applicability—Labour Court to apply section suo motu *irrespective of any plea regarding the applicability—Two workmen charged-sheeted by management with assaulting another worker—Domestic enquiry misconduct — Workmen held guilty of misconduct and dismissed—Union raising Industrial Dispute—Dispute referred to the Government—Award passed—Writ petition filed by the workmen dismissed—Appeal allowed and matter remitted.*

Held: When orders are passed subsequent to the enactment of section 11-A of the Industrial Disputes Act the Labour Court itself should take note of its existence. Its applicability does not depend upon the workmen seeking relief by referring to it. When section 11-A of the Industrial Disputes Act has been incorporated with effect from 15th December, 1971, a Labour Court functioning under the Act, is bound to apply such amendments which are carried out from time to time, irrespective of any plea raised pertaining to its jurisdiction. It is clear from the decisions of the Courts that subsequent to the introduction of section 11-A when a jurisdiction had been conferred on the Tribunal to satisfy itself about the correctness of the findings of misconduct, the Labour Court has to exercise the jurisdiction enjoined upon it under the provisions of the Act. It is not for the workman to plead an incidental and consequential relief made available to him by statute and no management can be heard to plead that, a statutory benefit should not be extended to an affected workman. The Labour Court *suo motu* has to apply section 11-A irrespective of whether a workman had mentioned the said section or not, and pleaded for relief thereunder or not. [*Para.* 13.]

The contention that the stage for interference under section 11-A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by the employer is not correct. In satisfying itself about the correctness of the finding it must re-appraise the evidence and find out whether the misconduct alleged has been made out or not. [*Para.* 16.]

When a charge framed has to be proved to the hilt on the evidence recorded, it would not subserve she purpose, unless the constituted authority analyses the evidence on record and gives valid reasons. In the instant case inspite of the evidence of an eye witness, that he had not seen "A" and more so when none of the other eye withesses mentioned by him in the complaint has been examined there is no reason why the uncorroborated evidence of the complainant alone should be acted upon. When there is no discussion of this aspect by the Tribunal, the contention of the appellant that there has been not only non-consideration of valid materials, but there has been a misreading of the evidence deserves to be accepted. [*Para.* 28.]

*W. A. No. 165 of 1977. 25th February, 1983.

Cases referred to:—

Workmen of Firestone Tyre & Rubber Company v. *Management*, (1973) 1 L. L. J. 278 : (1973) 1 S. C. C. 813 : (1973) Lab. I. C. 851 : (1973) 3 S. C. R. 587: A. I. R. 1973 S. C. 1227; *Indian Iron and Steel Company Limited and another* v. *Their Workmen*, (1958) S. C. R. 667 : 1958 S. C. J. 285 ; (1958) M. L. J.(Crl.) 266 : A. I. R. 1958 S. C. 130 ; *Gujarat Steel Tubes Ltd* v. *G. S. T. Mazdoor Sabha*, (1980) 1 L. L. J. 137 : (1980) 2 S. C. R. 145 : (1980) 2 S. C. C. 593 : (1980) Lab. I. C. 1004 : A. I. R. 1980 S. C. 1896 ; *Sri Gopalakrishna Mills (P.) Ltd.* v. *Labour Court*, (1980) 1 L. L. J. 425 : (1981) Lab. I. C. 209 ; *K. Ramaswamy* v. *Government of Tamil Nadu*, (1979) 2 L. L. J. 305 ; *R. M. Parmar* v. *Gujarat Electricity Board. Baroda*, (1982) Lab. I. C. 1031 : (1982) 23 Guj. L. R. 352 ; *Rama Kant Misra* v. *State of Uttar Pradesh*. (1982) Lab. I. C. 1790 : A. I. R. 1982 S. C. 1552; *Balipara Tea Estate* v. *Its workmen*, (1959) 2 L. L. J. 245: A. I. R. 1960 S. C. 191 ; *J. K. Iron and Steel Company, Kanpur* v. *The Iron and Steel Mazdoor Union, Kanpur*, 1956 S. C. J. 270 : (1955) 2 S. C. R. 1 15 A. I. R. 1956 S. C. 231 ; *Shankar Chakravarti* v. *Britannia Biscuit Company*, (1979) 2 L. L. J. 194 (1979) 3 S. C. C. 371 : (1979) Lab. I. C. 1192 : A I. R. 1979 S. C. 1652 ; *Tin Printers (P) Ltd* v. *Industrial Tribunal*, (1967) 2 L. L. J. 677; *Parry & Company* v. *Judge, 2nd I. T. Calcutta*, (1969) 2 S. C. R. 976 : (1970) 2 S. C. J. 433 : (1970) Lab. I C. 1071 : A. I. R. 1970 S. C. 1334 ; *Kumari G. Gabrial* v. *State of Madras*, (1959) 2 M. L. J. 15 ; *Union* v. *Sardar Bahadur*, (1972) 1 L. L. J. 1 ; *State of Haryana* v. *Rattan Singh*, (1977) Lab. I. C. 845 : (1977) 2 S. C. C 491 : (1977) 2 S. C. J. 140: A. I. R. 1977 S. C. 1512; *Girija Nandini* v. *Bijendra Narain*, (1967) 2 S. C. J 691 : (1967) 1 S. L. R. 93 : (1967) B. L. J. R. 513 : A. I. R. 1967 S. C. 1124 ; *Management S. R. P. Tools Ltd.* v. *Presiding Officer*, (1974) 1 L. L. J. 413.

Appeal under Clause 15 of the Letters patent against the order of Mr. Justice Mohan, dated 25th February. 1977 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 7315 of 1977 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to I. D. No. 95 of 1974 on the file of the 2nd respondent the Presiding Officer, Additional Labour Court, Madras, and quash his award, dated 30th June, 1975 and published in the Tamil Nadu Government Gazette, dated 13th August, 1975.

Row and Reddy, for Appellant.

N. Balasubramanian, for Respondent.

The Judgment of the Court was delivered by

Sathiadev, J.—This appeal is preferred against the judgment in W. P. No. 7315 of 1975, which in turn confirmed the order of the Additional Labour Court, Madras, in I. D. No. 95 of 1974, dated 30th June, 1975, holding that the dismissal of two workmen named Ambalavanan and Muralidharan by the first respondent-Management of Engine Valves Limited, Madras, was correct. First respondent charge-sheeted these two persons under Exhibits M-2 and M-3, dated 19th March, 1974, stating that the worker by name P. Shankar had reported to them under exhibit M-1, dated 18th March, 1974, that at about 5.25 P M. on 15th March, 1974, they assaulted him for having given over-production, at a place nearly one kilometre away from the respondent-company, and hence, clauses 16 (*h*) and 16 (*t*) of the Standing Orders of the Company had been violated. They submitted their explanations under Exhibits M-4 and M-5 claiming that at about 5.40 P. M. on that day, they were discussing with the other workmen in the factory itself regarding the talks going on with the Management. A domestic enquiry was conducted, in which the Management examined 6 witnesses and the workmen examined 9 witnesses, and the Enquiry Officer in his finding under Exhibit M-9, dated 10th April, 1974, held that the workmen were guilty of misconduct falling under the latter part of clause 16 (*t*) of the Standing Order, it being commission of a serious act of misconduct *viz.*, an act subversive of discipline. First respondent herein (hereinafter referred to as Management) passed orders of dismissal under Exhibits M-13 and M-14, dated 23rd April, 1974. Aggrieved against the said order, the Union raised an industrial dispute, which in turn resulted in the dispute being referred by government to

second respondent, who passed the award on 30th June, 1975.

2. Mr. N. G. R. Prasad, learned counsel for the appellant, contends that the Labour Court has misunderstood the law applicable to the reference made to it, and there being a failure to invoke section 11-A of the Industrial Disputes Act, the award being illegal, the learned Judge ought to have remitted the matter for proper disposal. He would further state that there being a misreading of the evidence on record, any attempt made to render a finding on the alleged misconduct, should have been taken note of by the learned Judge, and there being patent errors committed, the appellant is entitled to the relief, as prayed for.

3. Mr. M. R Narayanaswamy, learned counsel for Management, would submit that when appellant at no point of time, till the filing of the writ petition, having invoked section 11-A, the Labour Court *suo motu* cannot be expected to apply it. Inspite of whatever the Labour Court might have observed in para. 12 of its order pertaining to its jurisdiction, since it had dealt with the evidence on record and found that the order of dismissal is justified, appellant can no longer plead about any misreading of evidence by it. Learned Single Judge has also carefully gone through the evidence and found no valid ground existing for holding that the dismissal was not justified. When there is absence of pleading, rested on section 11-A, appellant cannot make it a ground for the matter being remitted.

4. It is the admitted case that, till the filing of the writ petition, at no point of time, appellant had ever specifically mentioned section 11-A to be applied. This section came into force with effect from 15th December, 1971. The Management passed orders of dismissal on 23rd April, 1974. Labour Court passed its order on 30th June, 1975. Even the occurrence is said to have taken place, only on 15th March, 1974. Therefore, when orders have been passed subsequent to the enactment of section 11-A, would it be applicable only if the workmen seek for relief by referring to it or would it be obligatory on the part of the Labour Court itself to take note of its existence, and find out as to what extent it would be relevant for the disposal of the reference?

5. On the scope and applicability of section 11-A, the earliest of the decisions is that reported in *Workmen of Firestone Tyre & Rubber Co.* v. *Management*[1]. It was held therein by the Supreme Court that:

> "...The words "in the course of the adjudication proceeding the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicate that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer established the misconduct alleged against a workmen. What was originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a satisfaction being arrived at by the Tribunal that the finding of misconduct, is correct. The limitations imposed on the powers of the Tribunal by the decision in *Indian Iron & Steel Co. Ltd. case*[2], can no longer be invoked by an employer. The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct, but also to differ from the said finding if a proper case is made out. What was once largely in the realm of satisfication of the employer, has ceased to be so, and now it is the satisfaction of the Tribunal that finally decides the matter".

It then held that even now the employer is entitled to adduce evidence for the first time before the Tribunal even if he had not held an enquiry or the enquiry held by him is found to be defective. Then it proceeded to hold :

> "...To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or

1. (1973) 1 L. L. J. 278 : (1973) 1 S. C. C. 813 : 1973 Lab. I. C 851 : (1973) 3 S. C. R. 587 : A. I. R. 1973 S. C. 1227.
2. 1958 S. C. R. 667 : 1958 S .C. J. 285 : (1958) M. L. J. (Crl.) 266 : A. I. R. 1958 S. C. 130.

discharge. In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman any lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by section 11-A".

Hence, the contention raised that the stage for interference under section 11-A by the Tribunal is reached, only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer, was rejected, and held as above.

6. Referring to an earlier decision of that Court in *Indian Iron and Steel Company Limited and another* v. *Their Workmen*[1], it was pointed out that previously the Tribunal had no power to interfere with a finding of misconduct recorded in the domestic enquiry, unless the infirmities like want of good faith, victimisation, unfair labour practice, etc., on the part of the management exist. After section 11-A was incorporated, "the Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct, but also to differ from the said finding if a proper case is made out" Hence, it is not the satisfaction of the employer which is sufficient, but the Tribunal has to satisfy itself by considering the evidence on record.

7. Considering as to whether an Arbitrator while functioning under section 10-A of Industrial Disputes Act, should take note of section 11-A it was held by the Supreme Court in *Gujarat Steel Tubes Ltd.* v. *G. S T. Mazdoor Sabha*[2] that such an Arbitrator will have to take a decision keeping in view the spirit of section 11-A, thus emphasising the important role assigned to section 11-A, in dealing with the termination order passed against the workmen.

8. A Division Bench of this Court in *Sri Gopalakrishna Mills Private Limited* v. *Labour Court*[1], recognises the power of the Labour Court to deal with the punishment imposed and the extent to which it could interfere, but does not deal with the point involved herein.

9. In *K. Ramaswamy* v. *Government of Tamil Nadu*[2], it was held that when the appropriate Government passed an order under section 12 (5) refusing to refer a dispute for adjudication, it is bound to take note of section 11-A thus stressing the significance of the section in dealing with rights of women.

10. A Division Bench of Gujarat High Court in *R. M. Parmar* v. *Gujarat Electricity Board, Baroda*[3], held, that it is not necessary for a workman to admit charges or to plead guilty in order to enable him to invoke the jurisdiction of the Court under section 11-A to reduce the penalty, and he need not with bended knees and folded hands plead before Labour Court for reduction of penalty, particularly when he has been conferred with a right to invoke the said powers of the Labour Court under section 11-A for reduction of the penalty.

11. In *Rama Kant Misra* v. *State of Uttar Pradesh*[4], the Supreme Court held that, before it can exercise the discretion conferred by section 11-A, the Court has to be satisfied that the order of discharge or dismissal was not justified in the facts and circumstances of the case. It was further held therein that, even if the miscondut is proved and a penalty has to be imposed, the extreme penalty of dismissal or discharge, whether justified on the facts and circumstances of the case, would have to be gone into, since a penalty must be commensurate with the gravity of the offence charged. It was held therein that the order of dismissal was not justified, and hence, the workman was directed to be reinstated with all the benefits.

12. Mr. M. R. Narayanaswamy, learned counsel for management refers to *M/s. Iron and Steel Company* v. *Their Workmen*[5], and

1. 1958 S. C J. 285: (1958) M. L. J. (Crl.) 266 : A. I. R. 1958 S C. 130.
2. (1980) 1 L L. J. 137: (1980) 2 S. C. R. 146: (1980) 2 S. C. C. 583: (1980) Lab. I C. 1004: A. I. R. 1980 S. C. 1896.

1. (1980) 1 L. L. J. 425 : 1980 Lab. I. C 209.
2. (1979) 2 L L. J. 305.
3. 1982 L. I. C. 1031 : (1983) 24 Guj. L. R. 352.
4. 1982 L. I. C. 1790 : A. I. R. 1982 S. C. 1552.
5. 1958 S. C. J. 285: (1958) M. L. J. (Crl.) 266 ; A. I. R. 1958 S. C. 130.

contends that prior to 15th December, 1971, it was held that the Tribunal could not act as a Court of appeal and substitute its own judgment for that of the management, and would interfere (*i*) when there is want of good faith; (*ii*) when there is victimisation or unfair labour practice; (*iii*) when the management has committed a basic error or violation of a principle of natural justice; and (*iv*) when on the materials, the finding is completely baseless or perverse, and therefore, even subsequent to the decision rendered in, *Workmen of Firestone Tyre and Rubber Company* v. *Management*[1], unless the affected workmen invokes section 11-A none of the decisions above referred to, impels a Labour Court to apply section 11-A on its own. When there has been no pleading on this aspect, he would submit that none of the decisions above referred to, would be of any assistance to appellant at this belated stage, to ask for section 11-A to be applied,

13. This Court considers that, when section 11-A had been incorporated with effect from 15th December, 1971, a Labour Court functioning under the Act, is bound to apply such amendments which are carried out from time to time, irrespective of any plea raised pertaining to its jurisdiction. As pointed out in the decisions above referred subsequent to introduction of section 11-A when a jurisdiction had been conferred on the Tribunal to satisfy itself about the correctness of the finding of misconduct, the Labour Court failed to exercise the jurisdiction enjoined upon it under the provisions of the Act. It is not for a workman to plead an incidental and consequential relief, which is made available to him by statute, and no management can be heard to plead that a statutory benefit should not be extended to an affected workman. Unless, as pointed out in *Workmen of Firestone Tyre and Rubber Company* v. *Management*[1], the Tribunal satisfies itself about the correctness of the finding, it's award would be illegal. Hence, this Court holds that a Labour Court *suo motu* has to apply section 11-A, irrespective of whether a workman had mentioned the said section or not, and pleaded for relief thereunder or not.

14. Labour Court in understanding the jurisdiction it could exercise, had stated as follows :

> "..... It is not the jurisdiction of this Court to decide whether the charge framed against the workman concerned had been established to the satisfaction of this Court. This Court has only to be satisfied whether the management was justified in coming to the conclusion that the charge against the workman was well-founded on the evidence available and placed before the domestic enquiry. If there is evidence to show that the management had been actuated by any sinister motives or had indulged in unfair labour practice, or that the workman had been victimised for any activities of his in connection with the trade union it might have had reasons to be critical of the enquiry held by the management *vide* the decision reported in *Balipara Tea Estate* v. *Its Workmen*)[1]...."

It is needless to state that it has proceeded to pass an award on an erroneous understanding of its powers, as extracted above. It is sought to be contended by Mr. M. R. Narayanaswami, learned counsel for management, that this sentence is of no relevance, particularly when in the concluding portion, the Tribunal had analysed the evidence on record and found the dismissal valid. The learned single Judge has also held that "it is not open to the petitioners to take advantage of the single sentence occurring in paragraph 12 of the award and make much out of it." Labour Court has chosen to spell out to what extent it could exercise its jurisdiction when called upon to reappraise evidence. It is stated by it that on behalf of the workers, it was vehemently contended that the management had not examined anyone of the eye witnesses, apart from M. Ws. 2 to 6, and hence, the enquiry is vitiated and the findings are perverse. It is to impress that it would not be open to the workmen to call upon it to reappraise the evidence, it had stated as

1. (1973) 3 S. C.R. 587: (1973) 1 S. C. C. 813 : (1973) 1 L. L. J. 278.

1. (1959) 2 L. L J. 245 at 248 : A. I. R. 1960 S. C. 191.

extracted above. When, in a crystal clear manner, by referring to the decision in *Balipara Tea Estate* v. *Its Workmen*[1], it has circumscribed the jurisdiction which it could exercise, it could not be correct to characterise that it was a chance sentence in the award, which would not vitiate it. Labour Court having chosen to look at the evidence on record, only on the basis or principles laid down in the decision in *Balipara Tea Estate's case*[1], which was no longer good law in the light of section 11-A having been enacted, whatever limited analysis it had made of the evidence, in the concluding portion of the order cannot be understood as done, in the light of what it could do under section 11-A of the Act. Hence, the learned Judge was not correct in holding that appellant is taking advantage of a single sentence, whereas it is only because of this approach Labour Court had failed to exercise its jurisdiction under section 11-A of the Act. This being one of the errors in the order of the learned Judge, with reference to the jurisdiction of the Labour Court, this appeal requires to be allowed.

15. The next patent error pointed out is that, the learned Judge had stated that the Labour Court "also considered the quantum of punishment as it is required to do so under section 11-A", though in no part of the order, such a consideration had been made. This plea has to be straightway accepted because, it is not even the claim of the management that Labour Court had considered the quantum of punishment in any portion of its order. This is again, another error which entails setting aside the order of the learned Judge.

16. The third error made out is that, the learned Judge has taken the view that section 11-A confers jurisdiction on the Labour Court to reappraise evidence and consider and quantum of punishment, only when it is satisfied that the order of discharge or dismissal was not justified. In paragraph 38 in *Workmen of Firestone Tyre & Rubber Company* v. *Management*[2], the Supreme Court rejected the contention that the stage for interference under section 11-A would reach, only when it has to considered the punishment after having accepted the finding of guilt recorded by an employer, and proceeded to hold that, in satisfying itself about the correctness of the finding, it must itself reappraise the evidence and find out whether the misconduct alleged has been made out or not. To come to a conclusion either way, it will has to first reappraise the evidence for itself. Therefore, the conclusion of the learned Judge that "there is absolutely no infirmity" is not correct.

1 (1959) 2 L. L. J. 245 : A. I. R. 1960 S. C. 191.
2. (1973) 3 S. C. R. 587 : (1973) I L. L. J: 278.

17. As stated above, one of the objections taken by Mr. Narayanaswamy, learned counsel for the management is that, when there is no pleading on a substantial point, no relief could be extended under section 11-A. To substantiate his contention, he first refers to *J. K. Iron and Steel Co., Kanpur* v. *The Iron and Steel Mazdoor Union, Kanpur*[1], wherein it took into account that, when what was referred related only to the justification for retrenchment of workmen, whereas the award directed laying off by rotation of persons whose cases were not before Arbitrator, it was held that, the pleadings of the parties cannot be ignored, since the reason for requiring pleadings and issues, is to ascertain the dispute between parties; to narrow the area of conflict and to see just where the two sides differ. Taking note of the attitude of both the Arbitrator and the Appellate Tribunal, in basing their conclusions on irrelevant considerations and ignoring the relevant questions that arose for consideration out of the pleadings of the parties, the matter was remitted to the Tribunal for a proper decision after drawing up issues that arose out of the pleadings.

18. Reliance is then made on *Shankar Chakravarti* v. *Britannia Biscuit Company*[2], in which it was laid down that—

> " :.It is well-settled that allegation which is not pleaded, even if there is evidence in support of it cannot be examined because

1. 1956 S C J. 270 : (1955) 2 S. C. R. 1315 : A. I. R. 1956 S. C. 231.
2. (1979) 2 L. L. J. 194 : (1979) 3 S. C. C. 371 : 1979 Lab. I. C. 1192 : A. I. R. 1979 S. C. 1652

the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in *Tin Printers (P) Ltd.* v. *Industrial Tribunal*[1], commends to us The rules of fair play demand where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary".

19. What was dealt with in the above decision pertained to factual aspects and it was also recognised therein that the pleadings before such bodies are not to be read strictly, but it should be such as to put the other party on sufficient notice of what was being claimed.

20. He then refers to *Parry & Co.* v. *Judge 2nd I. T. O. Calcutta*[2], which after referring to *J. K Iron & Steel Co.*[3], held, that a Labour Tribunal has to confine itself to pleadings and issues arising therefrom, and it is not open to it to fly off at a tangent disregarding the pleadings and reach any conclusion that it thought as just and proper.

21. The following passsage in Maxwell on Interpretation of Statutes (11th Edition) is also relied upon:

"......So whenever a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having a right to make the application, and the exercise depends, not on the discretion of the Courts or Judges, but upon proof of the particular case out of which the power arises......".

22. At page 286 of Craies on Statute Law (6th Edition), it is stated as follows :

"... ..When, "said the Court," a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested, and having the right to make the application ...."

23. Rule 34 (2-A) of Tamil Nadu Industrial Disputes Rules, 1958 is read out to show that a Labour Court has to see the real issue involved in a matter, and therefore, unless the workmen seek for a specific issue framed on section 11-A, its invocability is unavailable to them.

24 On behalf of the appellant, it is claimed that no doubt section 11-A has not been mentioned either in the claim statement or in its reply, but the relief asked for, was for reinstatement of the workmen with full back wages, continuity of service and other attendant benefits, which would mean that, the relief asked for being wider, the failure to refer to section 11-A had not in any manner, deprived the management to deal with its applicability, if only the Tribunal had chosen to hear the arguments on reappraisal of evidence. When it is the duty of the Labour Court to bear in mind the applicability of section 11-A, which is a statutory benefit conferred on the workmen, there is no need for any specific pleading on this aspect.

25. Even if for any reason it be held that the Labour Court need not *suo motu* refer to section 11-A, when not specifically mentioned, yet the failure to refer to the said section by its number would not deprive a workman of the right to secure the benefit under section 11-A, because they have sought for reinstatement, which itself

1. (1967) 2 L. L. J. 677 at 680.
2. (1969) 2 S. C. R. 976 : (1970) 2 S. C. J. 433 : (1970) Lab. I. C. 1071 : A. I. R. 1970 S. C. 1334.
3. 1956 S. C. J. 270 : A. I. R. 1956 S. C. 231.

is a sufficient indication to the management to place the necessary materials as to why such a relief should not be granted and which would adequately meet the requirements, which have to be placed by the management under section 11-A.

26. One other point taken by appellant is that, Labour Court misread the evidence on record, if for any reason it be held that it had applied section 11-A inspite of what it stated about the jurisdiction which it would exercise relying upon *Balipara Tea Estate*[1]. It is contended that so far as Ambalavanan is concerned, M. Ws. 2 and 6 have stated that they have not seen him at the place of the occurrence. The enquiry officer has stated that as regards D-1, both M. Ws. 2 and 6 say that they did not see him". It is only M. W. 1 Shankar, who claims to have been assaulted, has stated in his complaint, that Ambalavanan had questioned him as to why he was giving higher production and if on the following Monday he repeats such performance, he would be beaten, and so stating beat him.

27. It has been the claim of the appellant that, when management had not examined anyone of the eye witnesses mentioned in the complaint, apart from M. W. 2, and when he has stated that Ambalavanan was not seen by him, the finding of the enquiry officer that he was guilty of misconduct is perverse, when no valid grounds were stated as to how far the claim of M. W. 1 alone could be acted upon. When this aspect was highlighted, Labour Court stated that it had no jurisdiction to reappraise the evidence. It is for the limited aspects, as laid down in *Balipara Tea Estate*[1], it had referred to the evidence tendered before the enquiry officer. In so doing, it stated that the evidence of M. Ws. 1, 2 and M. W. 6 clearly and sufficiently prove that these two workmen did assault the complainant for having given higher production. It is this solitary sentence which is relied upon by the learned counsel for management, to plead that the evidence on record in respect of both of them having been analysed in this manner, it is to the effect that the Tribunal had chosen to act upon the uncorroborated claim of M. W. 1 and found that Ambalavanan had also assaulted Shankar. The learned single Judge also held that these observations are general in character.

28. When a charge framed has to be proved to the hilt on the evidence recorded, it would not subserve the purpose, unless the constituted authority analyses the evidence on record and gives valid reasons as to why inspite of the evidence of an eye witness, that he had not seen Ambalavanan, and more so when none of the other eye witnesses mentioned by him in the complaint having not been examined, the uncorroborated evidence of the complainant alone should be acted upon. When there is no discussion on this aspect by the Tribunal, the contention of the appellant that there has been not only non-consideration of valid materials, but there has been a misreading of the evidence, deserves to be accepted.

29. Reliance is placed on *Kumari C. Gabrie* v. *State of Madras*[1], wherein it was held that in all enquiries, judicial, departmental, or other, not only in the procedural stages, but also in dealing with the evidence and the materials on record when drawing up the final orders, it must be done fairly, and one of the essential requirements is that the conclusion must be rested on the evidence and not on matters outside the record. It should not be based on a misreading of the evidence. Such requirements being basic cannot be whittled down; whatever be the nature of the enquiry, justice should manifestly appear to have been done. Per *contra* learned counsel for the management, would plead that the standard of proof required in such proceedings is not akin to what takes place in a trial in criminal Courts or in civil Courts, and there is no need for the Tribunal to give elaborate reasons for the conclusions or findings rendered by it. To sustain this contention, he first refers to *Balipara Tea Estate case*[2] which was rendered by the Supreme Court prior to section 11-A, holding that an Industrial Tribunal need not deal with the merits of the matter afresh, as if it were a trial for a criminal offence, and in

1. (1959) 2 L. L. J. 245 : A. I. R. 1960 S. C. 191.

1. (1959) 2 M. L. J. 15.
2. (1959) 2 L. L. J. 245

that case, the Tribunal had misdirected itself in insisting upon conclusive proof of guilt by the management adducing the necessary evidence, since it was well settled that a Tribunal had to find out only whether there was justification for the management to dismiss an employee and whether a case of misconduct has been made out in the enquiry itself.

30. In *Union* v. *Sardar Bahadur*[1], which dealt with disciplinary proceedings taken against a Central Government servant, it was held that, such a proceeding is not a criminal trial and therefore, the scope of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt.

31. Dealing with the case of a bus conductor in the State Transport undertaking in *State of Haryana* v. *Rattan Singh*[2], it was reiterated that in a domestic enquiry the strict and sophisticated rules of evidence under the Evidence Act may not apply and all materials which are logically probative for a prudent mind are permissible, and that departmental authorities and administrative tribunals must be careful in evaluating such materials and should not glibly swallow, what is strictly speaking, not relevant under the Evidence Act. The sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding, is certainly available for the Court to look into, because it amounts to an error of law apparent on the record.

32. These decisions can be of no assistance to management, because; an Industrial Tribunal is duty bound to reappraise the evidence on record, and find out the correctness of the finding of misconduct. It cannot in a general manner touch upon the evidence without fully comprehending the evidence on record. No doubt a contention was raised resting upon the decision in *Girija Nandini* v. *Bijendra Narain*[3], that it is not the duty of the appellate Court, when it agrees with the view of the trial Court on the evidence, either to restate the effect of the evidence or to reiterate the reasons given by the trial Court, and that expression of general agreement with reasons given in the decision which is under appeal, would ordinarily suffice. Such an approach is no longer available to a Tribunal constituted under the Industrial Disputes Act, subsequent to 15th December, 1971. A reappraisal of evidence contemplates an elaborate and meticulous consideration of the evidence on record and reasons to be given for upholding the findings rendered in the domestic enquiry. It is to remove the menace of arbitrariness, unreasonable attitude in holding the enquiry, unfair approach made in the conduct of proceedings etc. Labour Courts, are now enjoined to scrutinise carefully and find out whether the misconduct alleged is established or not. It is to safeguard the vital interests of the weaker sections of the society, District Judges and Senior Judicial Officers are posted to function as Presiding Officers of Labour Courts, and they cannot in a hapazard or cursory manner touch upon the evidence on record in a general way and uphold the findings of the enquiry officer. This would be an unsatisfactory manner of discharging duties cast upon such officers. Having been assigned, to dispose of, only cases pertaining to Industrial Disputes, they are duty bound to meticulously consider the evidence on record and devote their utmost attention and care in finding out whether the misconduct alleged had been made out on the materials adduced in the enquiry. If only there had been a reappraisal of the evidence on record, then the Tribunal would have given a valid reason, as to why the sole testimony of M. W. 1 alone should be acted upon in the instant matter, as against Ambalavanan.

33. The learned single Judge also held, that there are only general observations, and in his view, it being not a criminal trial, there are no merits in the contention of the appellant about failure of the Labour Court in stating as to whose evidence it depends upon to hold the workmen guilty of the charges. This approach has ceased to exist nearly a decade back, and the cardinal duty of a Labour Court is to carefully analyse the

1. (1972) 1 L. L. J. 1.
2. (1977) Lab. I. C. 845 : (1977) 2 S. C. C. 491 : (1977) 2 S. C. J. 140 : A. I. R. 1977 S. C. 1512.
3. (1967) 2 S. C. J. 691 : (1967) 1 S. C. R. 93 : (1967) B. L. J. R. 513 : A. I. R. 1967 S. C. 1124.

evidence on record and give valid reasons for each one of the findings rendered by it. Any half-hearted cursory and general conclusions, for disposing of evidence on record, by using oft-repeated sentences, which could get in with any matter; and the entire evidence tendered by parties to proceedings being summarily and in a whole-sale manner disposed of as unbelievable or bristles with inconsistencies and improbabilities as found by the enquiry officer, and hence claim is not made out etc., cannot any longer be countenanced or approved by this Court. Whatever limited discussion of evidence is made by the Labour Court in the concluding portion of its order, does not disclose any application of mind to the evidence on record, to the extent required under section 11-A of the Act. Hence, there being not only failure to consider the evidence on record, but also misreading of evidence, another illegality having been committed, the need has arisen for the matter being remitted to it, for proper disposal.

34. It is claimed that the principles laid down in *Management, SRP Tools Ltd.* v. *Presiding Officer*[1], would apply, but Mr. M. R. Narayanaswami, points out that it was set aside in *The Management of SRP Tools Ltd.* v. *Presiding Officer, Madras*[2].

35. The other aspect is, whether it should be in respect of only Ambalavanan or it has to be redone in respect of both the workmen. When the order passed is beset with so many infirmities, particularly pertaining to the aspect of failure to exercise its jurisdiction, the matter has to be decided afresh in respect of both the workmen.

36. Hence, for all the reasons above stated, this appeal is allowed with costs payable by first respondent, resulting in the matter being remitted to the Labour Court, Madras, for fresh disposal. Advocate's fee fixed at Rs. 300.

R. S. —— *Appeal allowed*

1. (1974) 1 L. L. J. 431.
2. W. A. No. 233 of 1974.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Balasubrahmanyan, J.*

Mohamed Noordeen .... *Appellant**

v.

Ameena Ammal and another ... *Respondents.*

(A) *Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act (XL of 1971), sections 2 (3), 3, 4—Scope of section 4 Civil Court's jurisdiction if and how far ousted.*

(B) *Tamil Nadu Occupants of the Kudiyiruppu (Protection from Eviction) Act (XXXI of 1961, different from Act XL of 1971)—Act XL of 1971 to be construed on its own terms —Suit for possession as settlee of a house and backyard under a settlement—Defendant, son of settlor, in occupation since 1961—Allegation of defendant being a tenant under the plaintiff—Denial by the defendant—Suit dismissed by trial Court but decreed by District Court and confirmed in second appeal —Execution petition by decree-holder for delivery—Defendant claiming benefits under the Kudiyiruppu Act—Civil Court's jurisdiction to decide—Claim if tenable—Execution, if barred.*

In considering the question whether the judgment-debtor can claim the protection of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, in execution proceedings relating to a decree for possession which had become final,

Held: The *Explanation* of section 2 (3) of the Act enacts a rebuttable presumption that any person in occupation of a kudiyiruppu is an agriculturist or agricultural labourer. It is for the decree holder to rebut the initial presumption. [*Para.* 8.]

The most important condition which the judgment-debtor has to fulfil for invoking section 3 is to establish that he was in occupation of the kudiyiruppu on 19th June, 1971. The judgment-debtor was, in this case, in actual possession and *prima facie* he is entitled to invoke section 3 and claim full

*A. A. A. O. No. 104 of 1976, 30*th March*, 1979.

ownership as occupant. Even if the decree-holders wish to contest the claim of the judgment-debtor to the benefit of the Tamil Nadu Act LX of 1971, the proper forum would be not a civil Court but the authorised officer functioning under the Act. Section 4 of Act provides that if any disputes arise as to whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on the 19th of June, 1971, for purposes of section 3 of the Act, such a dispute shall be decided by the authorised officer. It may be that the Act leaves certain specified matters for being agitated before the civil Courts, such, for example, as the question of compensation. But it is quite clear from the section that where the statute empowers the authorised officer as a proper authority to determine any question arising under the Act, the civil court's jurisdiction to that extent is negatived. It is further clear from the enactment of sections 3 and 4 of the Act that the authorised officer is the sole authority to decide the question as to whether an occupant of a kudiyiruppu is entitled to ownership right, under section 3. Therefore the question whether the defendant can claim benefit under the Act, has ultimately to be decided only by the authorised officer. In this view also, the execution petition has got to be rejected. [*Paras.* 9 *and* 10.]

When section 4 leaves for decision by the authorised officer the dispute as to whether an agricultural labourer was occupying a kudiyiruppu on 19th August, 1974, it leaves for decision the following matters : whether the person concerned is an agriculturist or agricultural labourer or not, whether the property under his ocupation is kudiyiruppu or not, and whether the person claiming the rights under section 3 was in occupation of the kudiyiruppu on 19th June, 1971 or not. Both the Acts, Tamil Nadu Occupants of Kudiyiruppu (Protection from Eviction) Act (XXXI of 1961) and Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership Act, XL of 1971) may deal with the same subject—matter, but there are differences between the two Acts. The conditions precedent for the conferment of rights under the one Act are different from the conditions under the other Act. It would not therefore, be proper to construe the provisions of the Tamil Nadu Act XL of 1971 as though its provisions were controlled by the scheme and structure of the earlier enactment, Tamil Nadu Act XXXVIII of 1961. Tamil Nadu Act XL of 1971 has to be construed and understood on its own terms and not with reference to any other enactment. [*Para.* 11.]

The bar under section 25 of Tamil Nadu Act LX of 1971 is not couched in any difficult language. It is clear beyond doubt that the court's jurisdiction is completely ousted in all matters which the authorised officer is empowered by or under the Act to determine. Under section 4 of the Act read with section 3, it is the authorised officer and the authorised officer alone who has got jurisdiction to decide the disputes between the owner and the occupior of the Kudiyiruppu in all questions which arise between them concerning the rights conferred by section 3 of the Act. [*Para.* 13.]

The judgment-debtor being entitled to the initial presumption in his favour that he is an agreiculturist or agricultural labourer it is for the decree-holder to institute appropriate proceedings before the authorised officer for the relevant relief in this regard. So far as the execution petition is concerned the Courts below were in error in ordering eviction. The execution petition is dismissed. [*Para.* 14.]

Cases referred to:—

Ganesan v. *Madurai Achari*, (1979) 1 M. L. J. 29 : 91 L. W. 6 : 1977 T. L. N. J. 437 ; *Muniyandi* v. *Rajangam Iyer*, (1976) 1 M.L.J. 344 : 89 L. W. 249 : A. I. R. 1976 Mad. 287.

Appeal against the decree of the District Judge, East Thanjavur at Nagapattinam, dated 6th March, 1976, and passed in C. M. A. No. 79 of 1975. (E. P. No. 65 of 1975 in O. S. No. 71 of 1968 Court of the District Munsif at Nagapattinam).

A. S. Hussain, for Appellant.

T. R. Srinivasan, for Respondents.

The Court made the following

ORDER :—This civil miscellaneous second appeal arises out of execution proceedings.

It raises a question about the judgment-debtor's right to claim the protection of Tamil Nadu Act XL of 1971, called the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971.

2. This statute, Act XL of 1971, was invoked for the first time in this case in execution proceedings. It was not an issue between the parties at any earlier stage. The subject-matter of the claim under the Act was a house and backyard in a village in Nannilam Taluk. This property and another figured as the subject-matter of the suit. The suit was for possession. The plaintiffs in the suit claimed ownership of the suit property as settlees under a registered deed of settlement of the year 1953. The defendant was a son of the settlor. He came to the village some time after the settlor's death in 1961. He is in occupation of the house and backyard ever since. The suit was instituted in 1968. In the suit, the plaintiffs claimed that the defendant was a tenant under them on a monthly rent of Rs. 5. The defendant denied the tenancy. He denied the title of the plaintiffs. He asserted his own title to the property by adverse possession. This defence was accepted, and the trial Court dismissed the suit. On appeal by the plaintiffs, the District Court reversed the trial Court's decision and decreed the suit. This decree was confirmed by this Court in second appeal. The plaintiffs-decree-holders thereupon filed an execution against the defendant for delivery of possession of the suit property. It was at this stage that the judgment debtor put forward his claim under Act XL of 1971. He contended that the statute had conferred on him ownership of the suit house and backyard, and, that being so, execution cannot be levied against him so as to uproot him from the property. The executing Court, however, rejected this contention and ordered delivery of possession. The Court took the view that in the face of the decree for possession the judgment-debtor cannot avail himself of Act XL of 1971. On appeal, the District Court took the same view as the executing Court. The District Court further observed that even in the execution proceedings, the judgment-debtor had not come forward with any evidence to establish the necessary facts which would entitle him to the benefits claimed by him under the Act. The District Court accordingly confirmed the order for delivery of possession passed by the executing Court.

3. In this civil miscellaneous second appeal preferred by the defendant-judgment-debtor, it is urged on his behalf that execution of the decree for possession is barred, because the suit house is his Kudiyiruppu within the meaning of Act XL of 1971. It is further urged that on the basis on which the plaintiffs themselves had filed their suit in ejectment and had obtained their decree for possession, there was no need for any further materials to sustain the judgment-debtor's claim to be entitled to the benefits under the Act on the basis of continued possession of the Kudiyiruppu.

4. Learned counsel for the decreeholders, on the other hand, submits that the decree for possession against the judgment-debtor had become final after his appeals had proved unsuccessful. It was urged that the claim under the Kudiyiruppu Ownership Act does not lie at this stage. He submitted that the Tamil Nadu Act XL of 1971 bars the jurisdiction of civil Courts only in respect of matters on which the authorised officer had jurisdiction to determine questions arising under the Act. He pointed out that the only question within the exclusive jurisdiction of the authorised officer under the Act was to find out whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on 19th June, 1971, so as to enable him to claim ownership of the kudiyiruppu under section 3 of the Act. All other questions such, for instance, as to whether the claimant was an agriculturist or not, whether he was a tenant or licence or not, were not within the exclusive jurisdiction of the authorised officer, and they were. therefore, not entirely outside the scope of the civil Court, and that a civil Court was not barred from entertaining and determining such questions either in a suit or in other proceedings.

5. Learned counsel sought support from a decision of a learned single Judge of this Court, N. S. Ramaswami, J. reported in *Ganesan* v. *Madurai Achari*[1],

1. (1979) I M. L. J. 29 ; 91 L. W. 6 : (1977) T. N. L. J. 437.

On the strength of this decision, learned counsel submitted that the Courts below were right in entertaining and ordering the petition for executing the decree for possession against the judgment-debtor-appellant.

6. Arguments on either side so put forward bear on the construction of the relevant provisions of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971. The Act, under section 3 automatically confers absolute title over a kudiyiruppu if the person in occupation thereof is in occupation on 19th June, 1971 and is either an agriculturist or an agricultural labourer. *Explanation I* to section 2 (3) lays down a presumption that any person in occupation of a kudiyiruppu must be deemed to be an agriculturist or agricultural labourer, unless the contrary is proved.

7. It is the case of the decree-holders that the judgment-debtor was not a tenant or licencee of the premises. This submission seems to me to be against the teeth of the decree-holders' own case as put forward in the suit. It may be remembered that the whole basis of the suit was that the judgment-debtor who inducted into the suit properties subsequent to 1961 as a tenant on a monthly rent of Rs. 5. Indeed, one of the reliefs prayed for in the suit against the judgment-debtor was that he had fallen in arrears of rent. There was a prayer in the suit for recovery of arrears of rent in the sum of Rs. 175. It is, therefore, futile to claim that the judgment-debtor cannot qualify for rights of ownership under section 3 of the Act as a tenant of the premises.

8. It was then submitted that the judgment-debtor had not established that he was an agriculturist or an agricultural labourer entitled to the benefits of the Act. It was pointed out that apart from a bare assertion to that effect, the judgment-debtor had not adduced any evidence to support his claim in that behalf. This argument again misses the *Explanation I* to section 2 (3) of the Act which enacts a rebuttable presumption to the effect that any person occupying a kudiyiruppu is an agriculurist or agricultural labourer until the contrary is proved. In my view, the learned District Judge was in error in requiring the judgment-debtor to establish that he was an agriculturist or agricultural labourer and rejecting his claim under the Act for want of proof in that regard. What the learned District Judge ought to have done was to apply the presumption under the *Explanation* and call upon the decree-holders to adduce evidence to rebut the initial presumption in favour of the judgment-debtor.

9. The most important condition which the judgment-debtor had to fulfil for invoking section 3 of the Act was to establish that he was in occupation of the kudiyiruppu on 19th June, 1971. On this question, there does not seem to be any controversy. As I earlier mentioned, according to the decree-holders' own case, the judgment-debtor entered upon the possession of the suit properties subsequent to 1961. The prayer In the suit was for recevery of possession from the judgment-debtor. The trial Court, as I earlier mentioned, dismissed the decree-holders' suit which meant that it was the appellate Court which decreed the suit on appeal. This was confirmed by this Court in *Mohamed Nuruddin* v. *Ameena Ammal and Mohamed Abdullah*[1]. Even after the decree passed by the first appellate Court, as confirmed by this Court, it became necessary for the decree-holders to file an execution petition for actual delivery and possession. It is, therefore, quite clear that during the interregnum it was the judgment-debtor who was in actual physical occupation of the suit premises. The suit was filed as early as on 11th December, 1967 and right from that date, it was the judgment-debtor who had been in occupation of the suit premises. There can, therefore, be no doubt that he was in actual possession on the crucial date *viz.*, 19th June, 1971. It seems to me therefore that *prima facie* the judgment-debtor is entitled to invoke section 3 of the Act and claim the full ownership which has been conferred by that section on him as the occupant of the kudiyiruppu.

10. Even if the decree-holders wish to contest the claim of the judgment-debtor to the benefits of the Tamil Nadu Act XL of 1971, it seems to me that the proper forum would be not a civil Court, but the authorised

1. S.A. No. 95 of 1972.

officer functioning under the Act. Section 4 of the Act provides that if any dispute arises as to whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on the 19th June, 1971, for purposes of section 3 of the Act, such a dispute shall be decided by the authorised officer. Section 5 of the Act provides for an appeal to the aggrieved person against the order of the authorised officer. Sub-section (2) provides for the procedure to be prescribed by the rules. It is in this context that the provisions of section 23 of the Act are to be examined. section 23 provides :

> "Save as otherwise expressly provided in this Act, no civil Court shall have jurisdiction in respect of any matter which the Government are or the authorised officer is, empowered by or under this Act, to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It may be observed that the Act leaves certain specified matters for being agitated before the civil Courts such, for example, as the question of compensation. But it is quite clear from the section that where the statute empowers the authorised officer as a proper authority to determine any question arising under the Act, the civil Court's jurisdiction, to that extent, is negatived. It is further clear from the enactment of section 3 and section 4 of the Act that the authorised officer is the sole authority to decide the question as to whether an occupant of a kudiyiruppu is entitled to ownership rights under section 3. Therefore, this question, in any case, has ultimately to be decided only by the authorised officer. In this view also, the execution petition has got to be rejected.

11. It is true that N. S. Ramaswami, J., had laid down a different understanding of the scope of the bar under section 23 of the Act in the decision reported in *Ganesan* v. *Madurai Achari*[1], According to the reasoning of the learned Judge while the authorised officer has got exclusive jurisdiction under section 4, that jurisdiction is limited only to a determination of the question whether any agriculturist or agricultural labourer was occupying any kudiyiruppu on the 19th June, 1971. If the parties are at variance on the question whether it was a kudiyirupppu under the occupant or whether the occupant was a tenant or a licensee under the landlord, then these questions cannot be within the exclusive jurisdiction of the authorised officer under section 4 of the Act. The learned Judge observed thus :

> "It is not possible to read these provisions as conferring exclusive jurisdiction on the authorised officer to decide the question whether a site is a Kudiyiruppu or not. The Act nowhere says that such a question is one that has to be decided by the Authorised Officer. As already seen, all that section 4 says is that if there is a dispute as to whether an agriculturist or agricultural labourer was occupying a Kudiyriuppu on the 19th June, 1971 (—if he had so occupied, the ownership of the site would vest in him), this dispute has to be decided by the Authorised Officer. That does not mean that the question whether the site is a Kudiyiruppu, or not is within his exclusive jurisdiction. It should also be remembered that this Act is allied to the other Act, namely, the Kudiyiruppu Protection Act. It was already noticed that under the Act only an owner of a Kuddiyirrupu can approach the Authorised Officer to evict the tenant on any one of the grounds contained in section 3 (3) of the said Act, which presupposes that if the owner does not concede that the site is a Kudiyiruppu, he cannot possibly go to the Authorised Officer. Therefore, I am quite clear that even under the Kudiyiruppu Ownership Act the question whether a site is a Kudiyiruppu or not is within the jurisdiction of the civil Court. A decision by the civil Court on the point would be final. If, however, before any civil Court renders a decision on the question whether the site is a Kudiyiruppu or not, the dispute under section 4 (1) goes before the Authorised Officer, he may incidentally have to decide whether it is a Kudiyiruypu. But, if the civil Court has given a decision already, that would be binding on the parties."

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1. (1979) 1 M. L. J. 29 : 91 L. W. 6.

I am unable to accept this view of the jurisdiction of the authorised officer as correct. It seems to me that when section 4 leaves for decision by the authorised officer the dispute as to whether any agricultural labourer was occupying a Kudiyiruppu on 19th June, 1971, it leaves for decision the following matters :

1. Whether the person concerned is an agriculturist or an agricultural labourer or not?

2. Whether the property under his occupation is Kudiyiruppu or not? and

3. Whether the person claiming the rights under section 3 of the Act was in occupation of the Kudiyiruppu on 19th June, 1971, or not?

Ramaswami, J., has observed that the Act nowhere says that the controversy as to the nature of the Kudiyiruppu is to be settled by the Authorised Officer. I do not agree with this view. Section 4 of the Act has to be read in line with section 3. Section 3 confers full rights of ownership only on an agriculturist or agricultural labourer in occupation of the Kudiyiruppu on 19th June, 1971. Any dispute concerning this right is the dispute which is referred to under section 4. The words cannot be literally understood as to mean that only disputes as to the date of possession are to be decided by the Authorised Officer. It is implicit in the phraseology of section 4, when construed in line with, and in association with section 3, that all disputes which arise between a person in occupation and the owner of Kudiyiruppu are properly determined only by the Authorised Officer under section 4 subject to the right under section 3. I do not agree with the view of Ramaswami, J., that a civil Court has jurisdiction to decide the question as to whether a particular site is a Kudiyiruppu or not and if it decides that question, such a decision shall be final and shall be binding on the parties. The learned Judge concedes that the Authorised Officer may incidentally have to decide whether it is a Kudiyiruppu, thereby conceding that part of his function under section 4 is to decide that question. I do not, therefore, see any logic behind the theory that if a civil Court were to enter its finding that finding is binding on the parties; but not if the civil Court had not so rendered a finding. The learned Judge does not say what would be the position if an Authorised Officer had gone into the matter already as to whether a particular site is a Kudiyiruppu or not and whether any such finding can be canvassed before a civil Court when it had already been rendered by the Authorised Officer. It seems to me that the whole approach of the learned Judge has been conditioned by the fact that he had regarded the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, Tamil Nadu Act, XL of 1971 as one of a fascicule of Acts and hence it had to be construed in the light of the terms of another Act, the Tamil Nadu Occupants of Kudiyiruppu (Protection from Eviction) Act (Act XXXI of 1961). The learned Judge says that under the Kudiyiruppu Protection Act, only the owner of Kudiyiruppu can approach the Authorised Officer to evict the tenant. According to the learned Judge, if the owner does not concede that the site is a Kudiyiruppu, he cannot possibly go to the Authorised Officer. Even assuming that this view of the learned Judge is correct, I cannot see how it has any bearing on section 4 of Tamil Nadu Act No. XL of 1971. Both the Acts may deal with the same subject *viz.*, the occupants of Kudiyiruppu in Tamil Nadu; but there is a difference between the two Acts with reference to the scope of the subject-matter. For instance, under Tamil Nadu Act XXXVIII of 1961 protection from eviction is granted to occupants of Kudiyiruppu only in cases where the person in occupation was in occupation thereof on 31st March, 1959. Those who came to occupy Kudiyiruppus subsequent to that date are not entitled to such protection from eviction. Tamil Nadu Act XL of 1971 does not state that only those who are entitled to protection from eviction under Tamil Nadu Act XXXVIII of 1961 would be entitled to conferment of ownership rights of the Kudiyiruppu under section 3 of the Act. On the contrary, it is provided under section 3 of Tamil Nadu Act XL of 1971 that they must be in occupation on a particular date

i.e. on 19th June, 1971. That section does not say that the persons claiming the rights under the Act ought to have been in occupation of the Kudiyiruppu on 31st March, 1959, or any other later date or to be in continuous occupation thereof. Secondly, there is a pertinent difference in the scope of the two Acts: In Tamil Nadu Act XXXVIII of 1961, the agricultural land is so defined as to exclude plantation. An agriculturist or agricultural labourer is also similarly defined to exclude cultivators and workers in plantations. This exclusion is not to be found in the definitions of "agricultural land : agriculturist and agricultural labourer" found in Tamil Nadu Act XL of 1971. In my view, it would be a mistake to construe the provisions of Tamil Nadu Act XL of 1971 in the light of the Tamil Nadu Act XXXVIII of 1961. In any case, I cannot accept the view that the Authorised Officer cannot look further beyond his nose, to go into incidental questions. In other words, an occupant may not be entitled to protection if his occupation is on any date later than 31st March, 1959; but he will none the less be entitled to claim ownership under section 3 of the Tamil Nadu Act XL of 1971, if he establishes no more than that he was in occupation on 19th June, 1971. He will be entitled to such rights even though he was not in occupation on 31st March, 1959. A person may succeed in establishing his claim to ownership under the Tamil Nadu Act XL of 1971 even though he may not be entitled to protetion under Tamil Nadu Act XXXVIII of 1961. It may be that Tamil Nadu Act XL of 1971 conferring ownership rights has rendered otiose or nugatory the provisions of the earlier legislation. Suffice it to say that the two Acts are not identical. The condition precedent for the conferment of rights under the one Act is different from the conditions in the other Act. It would not, therefore, be proper to construe the provisions of the Tamil Nadu Act XL of 1971 as though its provisions were controlled by the scheme and structure of the earlier enactment, Tamil Nadu Act XXXVIII of 1961. Tamil Nadu Act XL of 1971 has to be construed and understood on its own terms and not with reference to any other enactment.

12. Learned counsel for the judgment-debtor cited, in his support, a Division Bench decision reported in *Muniyandi* v. *Rajangam Iyer*[1]. I am, however, not able to derive any support from that judgment since it deals with quite a different matter. I am inclined to rest my decision on my understanding of the scheme, the language and the required purpose of Tamil Nadu Act XL of 1971.

13. The bar under section 25 of Tamil Nadu Act XL of 1971 is not couched in any difficult language. It seems to me clear beyond doubt that the Court's jurisdiction is completely ousted in all matters which the Authorised Officer is empowered by or under the Act to determine. I am quite clear that under section 4 of the Act read with section 3, it is the Authorised Officer and the Authorised Officer alone who has got the jurisdiction to decide the disputes between the owner and the occupier of the Kudiyiruppu on all questions which arise between them concerning the rights conferred by section 3 of the Act.

14. For all the above reasons, I hold that the Courts below were in error in rejecting the objections put forward by the judgment-debtor. I have earlier held that the judgment-debtor has at least established that he is a tenant in occupation of the Kudiyiruppu on 19th June, 1971, and he is entitled to invoke the initial presumption in his favour that he is an agriculturist or an agricultural labourer. This does not, however, preclude the decree-holders from instituting appropriate proceedings before the Authorised Officer for the relevant relief in this regard. But so far as the execution petition is concerned, I am quite satisfied that the Courts below were in error in ordering his eviction

15. For all the reasons stated above, this civil miscellaneous second appeal is allowed and the orders of the Courts below are set aside and E. P. No. 65 of 1975 is dismissed. In the circumstances, there will be no order as to costs.

R. S. —— *Civil miscellaneous second appeal allowed.*

1. (1976) 1 M. L. J. 344 : 89 L. W. 249 : A. I. R. 1976 Mad. 287.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Mutha Pukhraj Ratanjee ... *Petitioner**

v.

Ganesh Mull Adaji ... *Respondent.*

(A) *Civil Procedure Code (V of 1908), Order 21, rules 66 and 95—Decree on a promissory note—Judgment-debtor's property sold in execution and purchased by the decreeholder —Sale confirmed—Petition for delivery of property—Delivery not effected—Suit by judgment-debtor for cancellation of decree and interim injunction to restrain decreeholder from prosecuting the execution petition—Petition for delivery "closed"— Judgment-debtor's suit dismissed and also appeal therefrom—Another application by the decreeholder for delivery of possession— Whether maintainable—"Closed"—Meaning of.*

(B) *Limitation Act (XXXVI of 1963), Articles 134 and 136—Second application for delivery of possession whether continuation of earlier application—Application made within twelve years cannot be stated to be barred by limitation.*

The petitioner had obtained a decree on 11th November, 1968 in O. S. No. 116 of 1967, City Civil Court against the respondent on a promissory note executed by him. The petitioner filed on 21st August, 1970, E. P. No. 5 of 1970 for attachment and sale of the respondent's immovable property to realise the decree-amount. Attachment was effected and sale followed, and the petitioner became Court-auction-purchaser. The sale was confirmed on 12th September, 1974. Thereafter the petitioner applied in E. A. No. 61 of 1975 for delivery of possession, which was ordered. Since however police aid was needed the petitioner filed E. A. No. 139 of 1975 on 24th March, 1975 for the purpose. The application was allowed and the property was directed to be delivered by 29th April, 1975. Meanwhile the respondent had filed O. S. No. 2406 of 1975 City Civil Court for cancellation of the decree made in O S. No. 116 of 1967 against him and also applied for an injuntion to restrain the petitioner from prosecuting further proceedings in E. A. No. 5 of 1970. On 24th September, 1975 the Court made an Order. "Property not delivered as the petitioner received stay order from City Civil Court, Madras. Petition closed". The respondent's suit was dismissed on 28th February, 1979. The petitioner filed an application for restoration of E. A. No. 61 of 1975. He had also filed E. A. No. 512 of 1980 on 22nd April, 1980, asking for delivery of possession of the property contending that the closure order of 24th September, 1975, was not due to any fault on his part, it should be deemed to have been made for statistical purposes and not on merits, and he was entitled to file another application to revive and continue the eariler proceeding. The respondent resisted the application as barred by time. The District Court held that the application was barred by limitation. In revision against the order,

Held: The District Court's observation regarding the endorsement of 24th September, 1975, that the petitioner received stay order from City Civil Court, Madras cannot be correct, is not justified. An endorsement solemnly made and acted upon by the Court resulting in the closure of the application cannot be got out of the way by merely describing it as incorrect. In the absence of materials showing conclusively such incorrectness, it has to be taken as representing the correct state of affairs as brought to the notice of the Court on the basis of which the Court has acted. Even if it was incorrect in the absence of anything to connect the petitioner with it, the petitioner cannot be penalised or put to loss on that account. If the endorsement had therefore to be acted upon as a correct representation to the Court, it is clear that on 29th April, 1975, the Court felt there was some intermediate obstacle effectively precluding the petitioner from taking delivery and hence ordered the closure of the application. The order passed in E. A. No. 61 of 1976 on 29th April, 1975 was not one passed on the merits but one for statistical purposes. [*Para.* 7.]

Admittedly, the eviction application for delivery of possession was filed into

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*C. R. P. No. 3934 of 1981. *25th November*, 1982.

Court within the time prescribed for such applications under Article 134 of the Limitation Act. It is also seen from the several orders spassed thereon, that the auction-purchaser on his part had taken all the necessary steps to secure delivery of possession of the property purchased by him. Indeed the petitioner had also moved for police aid and secured the same as well, and the Court directed the delivery of the property to the petitioner. It was on that day the application was closed by the Court below by passing the order. Under the circumstances the order of closure in the earlier application for delivery of possession cannot be stated to be an order passed on the merits of the application but was one presented with a view to take it off the file of the Court for statistical purposes. [*Para.* 7.]

The effect of such closure of application in execution for statistical purpose in well-settled. To 'close' an application on account of an inability to immediately carry out the order owing to an obstruction, for instance, tantamounts to the postponement of the carrying out of the order and this can be equated to a dismissal of the application. The Court treats the proceedings as closed only for statistical purposes. The earlier application must be still deemed to be pending and the subsequent application filed by the petitioner was only in the nature of a reminder to the Court drawing its attention to the pendency of the earlier application and requesting the Court to make the necessary steps to deliver effective possession of the property. For making such an application, there is no question of applicability of Article 134 or any other Article of the Limitation Act. [*Paras.* 7, 8.]

It must be taken that in the present case Article 136 of the Limitation Act can be applied to the order of delivery passed earlier and if so done within twelve years therefrom the petitioner can seek to enforce the order for delivery by means of an application. In this view the subsequent application cannot be stated to be barred by limitation. [*Para.* 13.]

Cases referred to:—

Perumal v. *Ramachandra Padayachi*, (1982) 1 M. L. J. 65 : (1981) 94 L. W. 674 ; *Shanbagavalli Ammal* v. *Damodaran*, (1964) 2 M. L. J. 267 : 77 L. W. 419; *Ramakrishnayya* v. *Venkata Subba Rao*, (1954) 1 M. L. J. 89 : 1954 M. W. N. 283 : A. I. R. 1954 Mad. 831 ; *Pattannayya* v. *Pattayya*, (1926) 50 M. L. J. 215 : A. I. R. 1926 Mad. 453 ; *Subramania* v. *Angappa Asari*, A. I. R. 1930 Mad. 328 ; *Appavoo* v. *Lakshmana*, (1933) 65 M. L. J. 805 : 38 L. W. 347 : A. I. R. 1933 Mad. 745 ; *V. Swamigal* v. *K. Goundan*, (1942) 2 M. L. J. 355 : 55 L. W. 569 (2) : A. I. R. 1942 Mad. 718 ; *Kotayya* v. *Narayana*, (1943) 2 M. L. J. 450 : A. I. R. 1944 Mad. 60 ; *Muthuveeranna* v. *Muthuvenkatarama*, (1951) 1 M. L. J. 196 : A I. R. 1951 Mad. 711 ; *Ramakrishna Mudali* v. *Sivarama Prasad*, 1956 An. W. R. 556 : A. I. R. 1957 Andh. 73 ; *Venkanna* v. *Bangararaju*, (1964) 6 S. C. R. 251 : A. I. R. 1964 S. C. 1454 ; *S. K. Sahgal* v. *Kishore Khanna*, 1959 S. C. J. 1099 : (1959) 2 S. C. R. 364 : A. I. R. 1959 S. C. 809.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chingleput, dated 31st July, 1981 and made in E. A. No. 512 of 1980 in E. P. No. 5 of 1970 in M. C. C. C. O. S. No. 116 of 1967.

Raghavan, M. S. Subramanian and *K. Hariharan*, for Petitioner.

A. Ranga, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition, at the instance of the plaintiff/decree-holder/auction-purchaser in O. S. No. 116 of 1967, City Civil Court, Madras, is directed against the order of the Court below in E. A. No. 5 of 1970 in M. C. C. C. O. S. No. 116 of 1957, dismissing an application filed by him under Order 21, rule 95, Code of Civil Procedure, praying for delivery of possession of the property.

2. The circumstances giving rise to the civil revision petition may be stated as under: The respondent herein executed a promissory note in favour of petitioner on 1st January, 1964 on the footing of which O. S. No. 116 of 1967 on the file of the City Civil Court, Madras, was instituted by the petitioner and a decree therein was also passed in his favour

on 11th November, 1968. With a view to realise the amounts due under the decree so obtained, the petitioner filed on 31st August, 1970 E. P. No. 5 of 1970 for attachment and sale of the immovable property belonging to the respondent. On 5th October, 1970, the property of the respondent was attached and the petitioner after obtaining (in E. A. No. 302 of 1972) from Court leave to bid and set off, became the purchaser of the property at the sale held on 18th December, 1972. On 17th January, 1973, the respondent herein filed an application under Order 21, rule 90, Code of Civil Procedure, to set aside the sale and along with that application filed E. A. No. 82 of 1973 for accepting security. The application in E. A. No. 82 of 1973 was dismissed on 12th September, 1974, when the application to set aside the sale filed under Order 21, rule 90, Code of Civil Procedure, had remained un-numbered. Consequent to the dismissal of the application in E. A. No. 82 of 1973 on 12th September, 1974, the Court-auction-sale in favour of the petitioner was also confirmed on 12th September. 1974. Thereupon, on 10th February, 1975, the petitioner applied in E. A. No. 61 of 1975 for delivery of possession of the property purchased by him in the Court-auction-sale held on 18th December, 1972. On 13th February, 1975, on that application, delivery was ordered by 13th March, 1975. On 13th March, 1975, since the delivery warrant was not returned, the Court directed that the delivery warrant be awaited and the matter was posted to 21st March, 1975. On 21st March, 1975, the Court passed the further order to the effect that the property was not delivered for want of police aid and breaking open of the lock. The matter was further adjourned to 2nd April, 1975, for steps. On 24th March, 1975, an application was filed by the petitioner in E. A. No. 139 of 1975 to make available police aid and that application was allowed on 2nd April, 1975, and the property was directed to be delivered by 29th April, 1975. Meanwhile, on 1st April, 1975, the respondent herein instituted O. S. No. 2408 of 1975, City Civil Court, Madras, for cancellation of the decree in O. S. No. 116 of 1967 and in I. A. No. 6767 of 1975 in O. S. No. 2408 of 1975, the respondent prayed for an interim injunction restraining the petitioner from prosecuting further proceedings in E. P. No. 5 of 1970. That matter was fixed for hearing on 15th April, 1975. However, in E. A. No. 61 of 1975, on 29th April, 1975, the Court passed the following Order :

> "Property not delivered as the petitioner received stay order from City Civil Court, Madras. Petition closed".

Meanwhile, on 23rd April, 1975, the respondent herein filed E. A. Nos. 180 and 181 of 1975 seeking restroration of E. A. No. 82 of 1973 dismissed on 12th September, 1974, and praying for a stay of further proceedings. Interim stay and notice was ordered on 26th April, 1975, and ultimately E. A No. 181 of 1975 was closed as unnecessary on 29th April, 1975. E. A. No. 180 of 1975 eventually was allowed on 31st August, 1976, and as a result thereof, the application filed by the respondent herein under Order 21, rule 90, Code of Civil Procedure, was taken on file on 8th September, 1976, as E. A. No. 465 of 1976 and was dismissed on the merits on 20th November, 1976. The petitioner on his part filed an application in September, 1978 for restoration of E. A. No. 61 of 1975, but for some reason or other, which is not quite clear, the application does not appear to have been entertained. The suit instituted on O. S. No. 2408 of 1975 was dismissed on 28th February, 1979. Again, the petitioner filed E. A. No. 653 of 1979 praying to recognise the power of attorney. The petitioner also filed E. A. No. 660 of 1979 on 20th March, 1979, for condoning the delay of 10 months and 10 days in filing the restoration application under section 5 of the Limitation Act. There was also another application filed by the petitioner on 20th March, 1979. along with E. A. No. 660 of 1979, which had remained unnumbered, for the restroration of E. A. No. 61 of 1975. The petitioner had also filed E. A. No. 512 of 1980 on 22nd April, 1980, out of which the present civil revision petition has arisen, purporting to be one for delivery of possession of the property. Against the dismissal of O. S. No. 2408 of 1975, the respondent had preferred an appeal in A. S. No. 63 of 1980 and that appeal also stood dismissed on 23rd June, 1980, and during the pendency of the

appeal, in C. M. P. No. 344 of 1980, the respondent had sought for and obtained stay of all further proceedings in O. S. No. 116 of 1967. After the dismissal of the appeal, on 27th June, 1980, the petitioner withdrew E. A. No. 660 of 1979 filed under section 5 of the Limitation Act.

3. In the affidavit filed in support of E. A. No. 512 of 1980, the petitioner had referred to the purchase of the property by him in Court-auction and the confirmation thereof on 12th September, 1974, the filing of E. A. No. 61 of 1975 for delivery of the property and the order for delivery passed therein, the institution of the suit in O. S. No. 2408 of 1975 by the respondent herein and the filing of an application therein, the closure of E. A. No. 61 of 1975 on 29th April, 1975, the proceedings initiated by the respondent herein under Order 21, rule 90, Code of Civil Procedure, and the dismissal thereof on 20th November, 1976 and stated that for no fault of his the application filed by him in E. A. No. 61 of 1975 had been closed on 29th April, 1975 and such closure should be deemed to be not on merits but only for statistical purposes and, therefore, he is entitled to file another application in the nature of a reminder to Court drawing its attention to the pendency of the application for delivery of possession and to request the Court to revive and continue the proceedings. However, the petttioner had prayed for the relief of delivery of the property through Court.

That application was resisted by the respondent herein on the ground that the application was barred by time. The confrmation of the sale in favour of the petitioner on 12th September, 1974 and the filing of an application by the petitioner for delivery in E. A. No. 61 of 1975 and the order for delivery on 2nd April, 1975 were admitted. The posting of the case E. A- No. 61 of 1975 to 29th April, 1975 was also not denied. The respondent further pleaded that though he had taken steps to set aside the sale, there was no legal impediment of any kind which prevented the petitioner from proceeding with his application for delivery filed in E. A. No. 61 of 1975, but that the petitioner did not pursue his application. The respondent further stated that though the petitioner had filed an application to excuse the delay in E. A. No. 660 of 1979, that application was dismissed as withdrawn on 27th June, 1980 and that the present application in E. A. No. 512 of 1980 having been filed more than three years after the dismissal of the application filed by the respondent under Order 21, rule 90, Code of Civil Procedure, would also be beyond time. The obstruction to delivery in E. A. No. 61 of 1975 should have been removed through Court, according to the respondent, and for his omission to do so, the petitioner has to thank himself. The respondent also put forth the objection that under Article 134 of the Limitation Act, the application in E. A. No. 512 of 1980 was barred as it had been filed beyond six years after the confirmation of the sale. A plea that the decree itself is void was also raised by the respondent. The application filed by the petitioner was also claimed to be barred by the principles of *res-judicata* or at any rate, by constructive *res-judicata*. On the aforesaid grounds, the respondent prayed for the dismissal of E. A. No. 512 of 1980.

4. The learned District Judge, Chengalpattu, who enquired into this application was of the view that the endorsement made on 29th April, 1975 in E. A. No. 61 of 1975 which led to the closure of E. A. No. 61 of 1975 cannot be correct, that after the termination of the proceedings initiated by the respondent in E. A. No. 465 of 1976 under Order 21, rule 90, Code of Civil Procedure, on 20th November, 1976 there was no impediment whatever for the petitioner to take delivrey of possession and that the application in E. A. No. 512 of 1980 was barred. Dealing with the question whether the application filed by the petitioner can be regarded as one for revival or continuation of the earlier application in E. A. No. 61 of 1975, the learned District Judge concluded that on the facts in this case the application filed by the petitioner cannot be said to be one for revival of the earlier application for delivery. On these conclusions, the application was dismissed. Challenging the correctness of this order, the petitioner has preferred this civil revision petition.

5. Mr. M. Raghavan, the learned counsel for the petitioner first submitted that E. A. No. 61 of 1975 was 'closed' on 29th April, 1975 and no final order therein was passed and such closure could only be for statistical

purpose and the subsequent application in E. A. No. 512 of 1980 was made only with a view to draw the attention of the Court to the pendency of E. A. No. 61 of 1975 and to pass further orders thereon and, therefore, the application filed by the petitioner could only be in the nature of an application for revival or continuation of the proceedings in E. A. No. 61 of 1975 and there being no prescribed time limit for making such an application, the present application should have been entertained and dealt with on the merits. In this connection, the learned counsel for the petitioner drew attention to certain decisions of this Court, which will be referred to later in the course of this judgment, to the effect that if the closure is without passing any final orders and for statistical purposes, then an application for revival or continuation can always be filed which would really be in the nature of a reminder to Court drawing attention to the pendency of the proceedings before it requesting it to pass orders thereon. Alternatively, the learned counsel for the petitioner submitted that the application in E. A. No. 512 of 1980 was with a view to execute the order for delivery passed on 13th December, 1975 in E. A. No. 61 of 1975 and that such an application can be made within the time prescribed under Article 136 of the Limitation Act, namely, twelve years from that date and, therefore, the application made in E. A. No. 512 of 1980 on 22nd April, 1980 would be well within time. Reliance in this connection was placed by the learned counsel for the petitioner on the decision in *Perumal* v. *Ramachandra Padayachi*[1].

6. On the other hand, the learned counsel for the respondent submitted that even on the assumption that the sale was confirmed only on the termination of the proceedings initiated by the respondent herein in E. A. No. 465 of 1976 on 20th November, 1976, the application in E. A. No. 512 of 1980 having been filed only on 22nd April, 1980 would be out of time as per Article 134 of the Limitation Act. It was also his further submission that there was no impediment in the taking of delivery of possession of the property by the petitioner as no stay order as such had been produced to establish that the petitioner was prevented from taking delivery of the property. However, the learned counsel for the respondent would not subscribe to the view taken by the Court below that the endorsement made on 29th April, 1975 in E. A. No. 61 of 1975 cannot be correct, but would state that E. A. No. 1975 was allowed to be closed only on account of the inaction of the petitioner and cannot, therefore, be called as 'closure' for statistical purposes. The learned counsel would also admit that an erroneous act of Court, if one such is established, should not prejudice the rights of parties. A faint argument was also attempted to be raised that the decree obtained by the petitioner herein in O. S. No. 116 of 1967, City Civil Court, Madras, is void. To substantiate the aforesaid submissions, the learned counsel for the respondent relied on the decisions in *Shanbagavalli Ammal* v. *Damodaran*[1] and *Ramakrishnayya* v. *Venkata Subba Rao*[2]

7. In order to appreciate these contentions raised, it would be necessary first to consider the nature and effect of the order passed on 29th January, 1975, in E. A. No. 61 of 1975. Admittedly, that application for delivery of possession was filed into Court within the time prescribed for such applications under Article 134 of the Limitation Act. It is also seen from the several orders passed thereon, that the petitioner, on his part, had taken all the necessary steps to secure delivery of possession of the property purchased by him. Indeed, the petitioner had also moved for police aid and secured the same as well and the Court directed the delivery of the property to the petitioner by 29th April, 1975. It was on that day the application in E. A. No. 61 of 1975 was closed by the Court below by passing the order referred to earlier. The learned District Judge, in the course of paragraph 5 of the order, has stated that the endorsement that the petitioner received stay order from City Civil Court, Madras cannot be correct. A perusal of the order passed by the Court below does not in any manner bring out the basis for this conclusion of the learned District Judge. An endorsement solemnly made and acted upon by the Court resulting in the

1. (1981) 94 L. W. 674 : (1982) 1 M. L. J. 65.

1. (1964) 2 M. L. J. 267 at 270 : 77 L. W. 419.
2. 1954 M. W. N. 283 : (1964) 2 M. L. J. 89 : A. I. R. 1954 Mad. 831.

closure of an application cannot be got out of the way by merely describing it as incorrect. In the absence of any materials showing conclusively that the endorsement was incorrect, it has to be taken as representing the correct state of affairs as brought to the notice of the Court on the basis of which the Court had also acted. Even on the footing that the statement was an incorrect one, in the absence of anything to connect the petitioner with such an incorrect statement the petitioner cannot be penalised or put to any loss on that account. It is indeed unfortunate that the Court below has proceeded on the assumption regarding the incorrect nature of the endorsement made on 29th April, 1975. That endorsement had, therefore, to be acted upon as a correct representation to Court, and if so done, it is clear that on 29th April, 1975, the Court was of the view that there was some kind of intermediate obstacle which would effectively prevent the petitioner from taking delivery of possession of the property purchased by him in court-auction and, therefore, had ordered the closure of the application without passing any final order touching upon the entitlement of the petitioner to delivery of possession of the property. Under those circumstances. the order passed in E. A. No. 61 of 1975 on 29th April. 1975, cannot be stated to be an order passed on the merits of the application. but one pronounced with a view to take E. A. No. 61 of 1975 off the file of the Court for statistical purposes. Indeed, the effect of closure of applications in execution for statistical purposes is well-settled. To close an application on account of an inability to immediately carry out the order owing to an obstruction, for instance, tantamounts to the postponement of the carrying out of the order and this cannot be equated to dismissal of the application. The Court treats the proceeding as closed only for statistical purposes.

8. A Division Bench of this Court in *Pattannayya* v. *Pattayya*[1], had to consider whether an application filed by the decree-holder on 3rd September. 1921 was in time, having regard to the earlier order passed in 1915 on another execution application, which was well within time, to the effect that one item was delivered and the petition was recorded. The Courts below dismissed the application as being barred by time. But Jackson, J., took the contrary view and on further appeal, the Bench pointed out the procedure to be followed by Courts executing the decree and stated that the passing of an order like the lodging of the petition, or recording it or striking it off, is not provided for at all and it is only to adjourn matters *sine die* the phraseology 'lodged' or 'recorded' 'struck off' had been used, but that the application would still be on the record of the executing Court. Further, it has been pointed out by the Bench that to speak of a revival of a petition which had not been dismissed would be incorrect and any subsequent application is only intended to call the attention of the Court to the fact that the petition has to be proceeded with, as no party should suffer by reason of the Court keeping the matter pending on its file. In that view, it was held that the execution petition filed in 1915 was pending and that the subsequent application filed was not barred. Pandalai, J. in *Subramnian* v. *Angappa Asari*[1], referred to the procedure of closing or striking off of such proceedings on statistical or administrative grounds and stated that such disposals are not judicial ones and that for purposes of limitation, they must be regarded as surviving or continuing. Walsh, J., in *Appavoo* v. *Lakshmana*[2], had to consider whether an application for delivery of possession of the property which was closed on 22nd September 1921 would bar a fresh similar application filed on 3rd March, 1927. The order 'closed' on the petition dated 22nd September, 1921, according to the learned Judge, was not a proper disposal and that the application dated 3rd March, 1927 should be regarded as a reminder to the Court to proceed with the original petition on which delivery was ordered and which was never properly disposed of and, therefore, the later application was not time-barred. The petitions filed subsequent to the passing of the order 'closed' on the application dated 22nd September, 1921 and before the filing of the application on 3rd March 1927 were all regarded as reminders to Court that the

1. (1926) 50 M. L. J. 215 : A. I. R. 1926 Mad. 453.

1. A. I. R. 1930 Mad. 328.
2. (1933) 65 M. L. J. 805 : 38 L. W. 347 : A. I. R. 1933 Mad. 745.

petitioner was pending and in this view, the plea of limitation was overruled. *V. Swamigal* v. *K. Goundan*[1] dealt with a petition for delivery of possession wherein excepting one item, the rest of the items were delivered and as the auction-purchaser apprehended obstruction, he stated that possession of that item could be taken later, which was recorded by the Court on 21st September, 1936 and the petition was dismissed. On 26 August, 1939, another application for delivery was filed on the ground that the later application must be considered to be a continuation of the prior application and, therefore, that application would be in time. The application was dismissed as barred by time by the Courts below Kuppuswami Ayyar, J., however, construed the order passed on 21st September, 1936 as one based on an apprehension of obstruction and expressing want of time to take possession with the police help and, therefore, it was the duty of the Court to have posted the petition to some other date It was also pointed out by the learned Judge that since the party was not at fault, the dismissal of the petition must be considered to be an order adjourning the same *sine die* till such time as steps are taken. The learned Judge held that the application was in time. In doing so he followed the judgment of Burn, J , in C. M. A. No. 5?0 of 1940. Horwill, J., in *Kotayya* v. *Narayana*[2] had to consider whether an application filed by the decree-holder on 11th February, 1941, after the striking off of the earlier application filed by him on 2nd February, 1938, would be in time. The application came to be struck off because of an obstruction. It was pointed out by the learned Judge that if there was a default in the prosecution of the application on the part of the auction-purchaser, then the dismissal is a final order disposing of the application. But, if the application had been merely closed for no fault of the auction-purchaser, then the application for delivery must still be deemed to be pending. Panchapakesa Ayyar, J , in *Muthveeranna* v. *Muthuvenkatarama*[1], has pointed out that despite the use by Court of expressions like 'struck off', 'lodged', 'recorded' or 'closed', if the reliefs prayed for or some of them remain undisposed of without being covered by final orders either granting or refusing them, the petitions will continue to remain on the file of the Court and that it was the duty of the Court to effectively and validly dispose of petitions and that when a petition is closed for statistical purposes, it must be deemed to be pending and should be proceeded with In *Ramakrishna Mudali* v. *Sivarama Prasad*[2], the sale in favour of the decree-holder was confirmed on 4th January, 1944 and an application for delivery of possession was made under Order 21, rule 95, Civil Procedure Code. But owing to the obstruction offered by the judgment-debtor, the application was dismissed on 22nd July, 1946. Another application was filed on 4th July, 1947 and an objection was raised that the application was barred. The Court pointed out that the prior application, notwithstanding its dismissal, must be deemed to be pending and that fresh application for delivery was only in the nature of a continuation of the former one and the application was, therefore, held to be in time. The Supreme Court in *Venkanna* v. *Bangararaju*[3], had occasion to consider the effect of orders like 'closed' or 'closed for statistical purposes' or 'struck off' or 'recorded' etc., passed in proceedings by executing Courts. The Supreme Court pointed out thus :

> "It is not necessary to express our opinion on the question whether such procedure is sanctioned by the Code of Civil Procedure or not ; but assuming that the Court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the Court in making an order "closed" for statistical purposes is manifest. It is intended not

1. (1942) 2 M.L. J. 355 : 55 L. W. 569 (2): A. I. R. 1942 Mad. 718.
2. (1943) 2 M. L.J. 450 : A. I. R. 1944 Mad 60.

1. (1951) 1 M.L. J. 196 : A I. R. 1951 Mad. 711.
2. 1956 An W. R. 556 : A. I. R. 1957 A. P. 73.
3. (1964) 6 S. C. R. 251: A. I. R. 1964 S. C. 1454.

to finally dispose of the application, but to keep it pending. Whether the order was without jurisdication or whether it was valid, the legal position would be the same ; in one case it would be ignored and in the other, it would mean what it stated. In either case the execution petition would be pending on the file of the Court. That apart, it is not the phraseology used by the executing Court that really matters, but it is really the substance of the order that is material. Whatever terminology may be used, it is for the Court to ascertain, having regard to the circumstances under which the said order was made, whether the Court intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the Court".

9. It is thus clear that the form of the order is not the determining factor, but it is the substance that matters. Viewed in this light, the order passed on 29th April, 1975, in E. A. No. 61 of 1975 cannot be considered to have finally determined the right of the petitioner to obtain delivery of possession of the property purchased by him. In that sense, the application in E. A. No. 61 of 1975 must be still deemed to be pending and the subsequent application filed by the petitioner in E. A. No. 512 of 1980 was only in the nature of a reminder to the Court drawing its attention to the pendency of E. A. No. 61 of 1975 and requesting the Court to take the necessary steps to deliver effective possession of the property to the petitioner. For making such an application, there is no question of applicability of Article 134 or any other Article of the Limitation Act. In *S. K. Sahgal* v. *Kishore Khanna*[1], the question arose whether for the purpose of continuing execution proceedings already commenced, any question of limitation would arise and the Supreme Court pointed out that it has long been recognised by the Courts in this country that a right to continue a proceeding which is pending, is a right which arises from day to day and no question of any bar of limitation with regard to the enforcement of such a right arises. In view of the aforesaid considerations, the application filed by the petitioner in E. A. No. 512 of 1980 was in the nature of a reminder to the Court drawing its attention to the pendency of E. A. No. 61 of 1975 and the need for passing further orders thereon and there being no prescribed period of limitation for making such an application, the application was well in time when it was made on 22nd April, 1980.

10. Earlier, it had been pointed out that the nature of the order passed on 29th April, 1975, in E. A. No. 61 of 1975 was not such as to determine the right of the petitioner finally, but that that application should be still considered to be pending as a result of the closure of that application by Court. In view of that, Article 134 of the Limitation Act cannot be applied to the application made by the petitioner in E. A. No. 512 of 1980, as contended by the respondent. Equally, the respondent cannot be heard now to say that there was no impediment in the taking delivery of possession of the property by the petitioner, as the endorsement made on 29th April 1975, proceeded on the footing that the petitioner had received a stay order from the City Civil Court, Madras. That endorsement has been already found to be correct and as such it was that which was responsible for the closure of the application in E. A. No. 61 of 1975 owing to the inability of the petitioner to take effective delivery of possession. Again, it has to be remembered that E. A. No. 61 of 1975 was not closed on account of any default on the part of the petitioner to take delivery or to pay batta or to take other steps in order to secure possession of the property purchased. On the contrary, the records disclose that for no fault of the petitioner, the application had been closed on account of an order of stay and, therefore, the petitioner cannot be charged with an omission to take the necessary steps so as to disentitle him from filing another application in E. A. No. 512 of 1980. Indeed, as noticed earlier, the learned counsel for the respondent was fair enough to admit that the endorsement made on 29th April, 1975 in E. A. No. 61 of 1975 was not incorrect, and if that be so, the closure of the application by the Court on the basis of the endorsement, which had not been established to be in any manner erroneous,

1. 1959 S. C. J. 1099 : (1959) 2 S. C. R. 364 : A. I. R. 1959 S. C. 809.

cannot prejudice the rights of the petitioner. In this view of the matter, the application filed by the petitioner in E. A. No. 512 of 1980 cannot be rejected on the ground that the prior application in E A. No. 61 of 1975 was allowed to be closed on account of the default of the petitioner.

11. The decisions referred to earlier and relied upon by the learned counsel for the respondent do not support the contentions urged by him. In *Ramakrishnayya* v. *Venkata Subba Rao*[1], the earlier applications were dismissed and disposed of owing to laches on the part of the decree-holder. Undoubtedly, in such a case, the decree-holder cannot be permitted to take advantage of his own laches and come forward with another application under the guise of one, either for revival or continuation Such is not the situation is the present case. In the decision in *Shanbagavalli Ammel* v. *Damodaran*[2], the principal question that arose for decision was whether an application for delivery of possession by an auction-purchaser, who had purchased the property in execution of a decree passed in the Original Side of this Court, will be governed by Article 180 or Article 183 of the Limitation Act. In holding that Article 180 of the Limitation Act would apply to such cases, the Bench also considered the effect of an incomplete order for delivery passed on a prior application and stated that in such cases, the subsequent application must be regarded as an application to bring up for orders the earlier application for delivery, but that in that case, the earlier application for delivery had been finally disposed of and, therefore, no question of revival would arise. The Bench further pointed out that an application for execution or for delivery of possession can be regarded as a continuation of the previous application in cases where there has been no complete disposal of the application on the previous occasion and where there has been a termination of such proceedings for a reason for which the decree-holder or the auction-purchaser is not responsible. The present case would fall under both the categories enumerated above and thus support the stand taken by the petitioner. Thus, on a consideration of the circumstances under which the prior order in E. A. No. 61 of 1975 came to be passed on 29th April, 1975, it is established beyond doubt that there was no disposal of that application on that date, but there was only a closure or striking off for statistical purposes and, therefore, the subsequent application filed by the petitioner in E. A. No. 512 of 1980 would be in the nature of an appliction reminding the Court to proceed with the earlier application for delivery and such an application would also be well in time.

12. Earlier, the termination of the proceedings instituted by the respondent in E A. No. 465 of 1976 under Order 21, rule 90, Code of Civil Procedure, on 20th November, 1976, has been noticed. Emboldened by this, the learned counsel for the respondent attempted to raise a plea of limitation as regards E. A. No. 512 of 1980 on the ground that that application had not been filed within one year after the confirmation of he sale, namely, 20th November, 1976 as contemplated by Article 134 of the Limitation Act. On the dismissal of the application in E. A. No. 82 of 1973 for the acceptance of security on 12th September, 1974, the sale in favour of the petitioner was also confirmed. Even so, as a result of the restoration of E. A. No 82 of 1973 in E. A. No. 180 of 1975 and the numbering of the petition to set aside the sale in E. A. No 465 of 1976 filed on 17th January, 1973 and the disposal thereof only on 20th November, 1976, the sale in the instant case cannot be stated to have become absolute during the period from 17th January, 1973, till the dismissal of E. A. No. 465 of 1976 on 20th November, 1976. But even before that, on 1st April, 1975, the respondent had instituted O. S. No. 2408 of 1975 challenging the very decree in O. S No. 116 of 1967 and that the suit was dismissed only on 28th February, 1979 and the appeal therefrom in A. S No. 63 of 1980 was also dismissed on 23rd June, 1980. In other words, between 1st April, 1975 till 23rd June, 1980 the very decree, in execution of which the petitioner had purchased the property, was put in peril and during that period, the court-auction-sale in execution of that decree in favour of the petitioner cannot be stated to have attained finality It is thus obvious that as a result of the proceedings initiated by the respondent, the petitioner

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1. (1954) 2 M. L. J. 89 : (1954) M. W. N. 283 : A. I. R. 1954 Mad. 831.
2. (1964) 2 M. L. J. 267 : 77 L. W. 419.

could not secure irrevocable and absolute title to the property till 23rd June, 1980 or at any rate, till 20th November, 1976. If 23rd June, 1980 is considered to be the date when the sale in favour of the petitioner had become absolute, then E A No. 512 of 1980 having been filed even prior to that date, cannot certainly be barred by limitation, even on the assumption that E. A. No. 512 of 1980 was a fresh application for delivery to which Article 134 of the Limitation Act would apply. On the other hand, if 20th November, 1976, is taken as the date when the sale in favour of the petitioner had become absolute, then even earlier to that date in E. A. No. 61 of 1975 the petitioner had made an application for delivery of possession of the property, which had been closed for statistical purposes, but was otherwise pending and E. A. No. 512 of 1980 was filed on 23rd April, 1980, for the continuation of the same and there again, as seen before, there cannot be any bar of limitation with reference to such an application. In either event, therefore, the plea of limitation raised by the respondent has to fail.

13. That leaves for consideration the alternative contention raised by the learned counsel for the petitioner based on the decision of this Court in *Perumal* v. *Ramachandra Padayachi*[1]. There also, the auction-purchaser got an order for delivery, but was not successful in obtaining actual delivery either because the warrant was returned un-executed due to obstruction or the property was found locked. Ultimately, the applications for delivery were dismissed by the executing Court. Thereafter, the purchaser again moved the executing Court for delivery of possession, as one of the properties was no longer under lock and key and the obstruction in the other was removed. However, by the time the second application was filed, more than a year had passed since the confirmation of the sale. A plea was, therefore, raised that Article 134 of the Limitation Act would apply and that plea was upheld by the Court below with reference to one of the cases and rejected in relation to the other. Both the matters were dealt with together by Balasubrahmanyan, J., as they related to a decision on an identical question of limitation. While pointing out that the Indian Limitation Act, 1963, has done away with the old-time ideas of revival, continuation, step-in-aid, etc., the learned Judge was of the view that the proper Article which would be applicable even in a case, where there had been an earlier order for delivery, is Article 136, as that Article applied not only to a decree, but also to an order of Court, which is executable as an order. In this view, the learned Judge held that the subsequant applications for delivery were in time, having been filed within a period of twelve years from the respective dates on which the earlier orders for delivery were made. Accordingly, in one of the cases, namely, C. R. P. No. 709 of 1980, where the lower Court had ordered delivery, that order was upheld, while in the other case. C. R. P. No. 347 of 1977, where the application for delivery had been dismissed by the lower Court, the learned Judge reversed that order and directed delivery. Against the order passed in C. R. P. No. 709 of 1980, the petitioners therein preferred a petition for special leave to appeal (Civil No. 6438 of 1981) before the Supreme Court of India challenging the correctness of that order and that petition was dismissed by the Supreme Court on 28th August, 1981. In view of the confirmation of the order passed by this Court in C. R. P. No. 709 of 1980 by the Supreme Court of India, it must be taken that in the instant case also, Article 136 of the Limitation Act can be applied to the order for delivery passed earlier in E. A. No. 61 of 1975 on 13th February, 1975, and if so done, within twelve years thereafter, the petitioner can seek to enforce the order for delivery by means of an application in E. A No. 512 of 1980 on or before 13th February, 1987. In this view also, E. A. No 512 of 1980 having been filed on 22nd April, 1980, cannot be stated to be barred by limitation.

14. The argument of the learned counsel for the respondent that the decree in O. S. No. 116 of 1967, City Civil Court, Madras, is void has to be stated only to be rejected. In the course of the delivery proceedings, it will not be open to the party to the suit to challenge the correctness of the decree in execution of which the property was sold.

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1. (1982) 1 M. L. J. 65 : 94 L. W. 674.

In addition, in this case, the responden had aleady instituted a suit challenging the decree and had failed therein and an appeal therefrom had also been dismissed. There is absolutely no material whatever to show that the decree in O. S. No. 116 of 1967, City Civil Court, Madras, was in any manner void. There is thus absolutely no substance whatever in this contention of the respondent No other point was urged.

15. For the foregoing reasons, the order of the Court below dismissing the application in E. A. No. 512 of 1980 filed by the petitioner cannot be sustained and has to be set aside. Consequently, E. A. Nos. 61 of 1975 and 512 of 1980 in E. P. No. 5 of 1970 in M. C. C. O. S. No. 116 of 1967 will stand restored and the Court below will proceed to deliver forthwith possession of the property purchased by the petitioner. The Civil revision petition is, therefore, allowed with costs.

R. S. —— *Pettion allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*S. Padmanabhan, J.*

The Tamil Nadu Livestock Inspectors' Association, represented by the General Secretary, Saidapet, Madras-15 ... *Petitioner**

v.

The Government of Tamil Nadu, represented by the Secretary to Government, Agriculture Department, Fort St. George, Madras and others ... *Respondents.*

and

The Tamil Nadu Livestock Inspectors' Association, represented by the General Secretary, Saidapet, Madras-15 ... *Petitioner**

v.

The Government of Tamil Nadu, represented by the Secretary to Government, Agriculture Department, Fort St., George, Madras-15 and others ... *Respondents*

*W. P. Nos. 254 and 383 of 1982, *27th July,* 1982

(A) *Constitution of India (1950), Article 226—Scope—Government Order (G. O. Ms. No. 2319, dated 19th October, 1981, Agricultural (A. H. 11), Department, directing posting of Veterinary graduates in posts of Extension Officers (Animal Husbandry) in Panchayat Union—Order whether arbitrary, unfair and liable to be quashed.*

(B) *Constitution of India, (1950) Article 226—Tamil Nadu Livestock Inspectors' Association—Composed of Livestock Inspectors Grade I and Grade II—Association registered under Societies Registration Act—Filing writ petition, challenging Government Order appointing Veterinary Graduates in the posts of Extension Officers—'Association' whether a person aggrieved—Whether writ petition filed by Association is maintainable.*

The Animal Husbandry Department, known as the Tamil Nadu Animal Husbandry Subordinate Service consists of two wings, Veterinary and Livestock Inspectors Grades I and II. The general educational qualification for appointment of a Livestock Inspector Grade II is a pass in the S. S. L. C Examination and in the one year certificate course in Animal Husbandry conducted by the Veterinary College Madras. In the hierarchy of the Regional set-up of Directors of Animal Husbandry, there are Veterinary Assistant Surgeons, who came above the Livestock Supervisors. The Livestock Inspectors Grade I are also posted as Extension Officers, Animal Husbandry in Panchayat Unions. Representations by the veterinary graduates to the Government that they should be appointed as extension officers in the panchayat unions replacing Livestock Inspectors grade I, were rejected by the Government more than once. However on 19th October, 1981, the Government issued G. O. Ms. No. 2319, Agricultural (A. H. 11) department directing the posting of verterinary graduates in the posts of extension officers (Animal Husbandry) in Panchayat Unions. It is in these circumstances that the writ petitions were filed to quash the Government Order.

A preliminary objection was taken regarding the maintainability of the writ petition where the petitioner was the Tamil Nadu Live Stock

Inspectors' Association on the ground that the Association as such is not an "aggrieved person" and consequently has no *locus standi* to file the writ petition.

Held: In this case, it cannot be said that the Livestock Inspectors, Gradees I and II are wayfarers or officious intervenera without any interest or concern over the subject-matter of the writ petition. The Association as such representing the body of Livestock Inspectors' Grades, I and II is really interested in safe-guarding the welfare of its members. If therefore, by the impugned notification the rights of any of the members of the Association have been prejudiced or excised without the authority of law by any act on the part of the State Government, certainly it would be open to the Association to come forward and protect rights of its individual members, whom it represents. It cannot be said that each and every one of the Livestock-Inspectors , Grades I and II must come forward, spend money and file individual writ petitions. The preliminary objection is overruled. It is clear that the rule laid down in *N. A. District Pawn Brokers Associations* v. *Secretary to Government of India*, (1975) 1 M. L. J. 290 has become obsolete. [*Para*. 11.]

The people have become more and more conscious about the rearing of quality livestock for better profit and progress. New techniques, equipments, preservation methods, breeds, etc., have been introduced and popularised. A highly sophisticated service in the fields of Animal Husbandry (including preventive and curative health cover, feeding, breeding and management) is expected by the ryots. Consequent to the efforts of the Department and other Development agencies, the animals of high quality and price are being reared on commercial lines by the people and they are demanding better technical know-how. Due to the multiplicity, of the sources of information, the message on Science and Technology, Research and Development in Animal Husbandry reach the public quickly, creating doubts and requiring clarification on many pointed issues. The rural people look to the Animal Husbandry Extension Workers for clarity of views and upto date knowledge on Research and Development. Animal Husbandry extension workers with a capacity to go deep into the problems and subject will alone be able to clear the genuine doubts of the public arising out of availability of information on latest developments. Therefore the veterinany graduates alone will be suited to work as Extension Officers in the field of Animal Husbandary". It is further stated in para. 11 of the counter- affidavit that the veterinary graduate has the technical knowledge and he can generate and pool resources and encouragement to self-employment in the Animal Husbandry sector. With the various cost-incentive schemes to improve the quality of livestock, the 'appropriate liaison officer, to function as Extension Officer (Animal Husbandry) is a veterinary graduate. Our rural people should not be denied the high level technology which could be popularised and put to actual use through veterinary graduates in panchayat unions for their livestock. It is therefore futile to contend that the Government Order is vitiated by the vice of arbitrariness so as to be struck down by invoking Article 14 of the Constitution. [*Para*. 12.]

The decision in the impugned Government Order cannot be characterised as arbitrary and made without having regard to the various aspects relevant to be considered on a matter like this. The decision is a policy decision on the basis of relevant materials and it is not for this Court to interfere with such decision under Article 226 of the Constitution unless it be that the decision arrived at is so arbitrary and unconscionable that it would affect all canons of fairplay in State action and unless the Court comes to a conclusion that the decision is absolutely arbitrary or irrational. [*Para. 18*.]

Cases referred to:—

The North Arcot District Pawn Brokers' Association v. *Secretary to Government of India*, (1975) 1 M. L. J. 290; *P. C. K. Union* v. *Union of India*, (1981) 2 S. C. W. R. 18 : 1980 Lab I. C. 1367 : (1981) 1 S. C. C. 568 : (1981) 2 S. C. R. 52 : A. I. R. 1981 S. C. 344; *A B. S. K. Sangh (Railway)* v. *Union of India*, (1981) 1 L. L. J. 209 : 1980 Lab I. C.

1325 : 1980 S. L. J. 734 : (1981) 1 S. C. C. 246 : (1981) 2 S. C. R. 185 : A. I. R. 1981 S. C. 298; *S. P. Gupta* v. *President of India*, 1981 S. C. C. (Supp.) 87 : A.I. R. 1982 S. C. 149; *K. K. Rajendran* v. *State of Tamil Nadu*, (1982) 2 S. C. C. 273 : 1982 Lab I. C. 876 : (1982) 1 S. L. J. 604 : A. I. R. 1982 S. C. 1107; *Ramanadayaram Shetty* v. *The International Air Port Authority of India*, (1979) 3 S. C C. 489 : A. I. R. 1979 S. C. 1628; *R. K. Khandelwal* v. *State of Uttar Pradesh*, (1982) 1 S. C. J 50 : (1981) 3 S. C. C. 592 : A. I. R. 1981 S. C. 1673; *Bar Council of Maharashtra* v. *M. V. Dabhalkar*, (1975) 2 S. C. C. 702 : (1976) 1 S. C. R. 306 : (1976) 2 S. C. J. 127 : A. I. R. 1975 S. C. 2092; *Bar Council of Maharashtra* v. *M. V. Dabhalkar*, (1976) 2 S. C. R. 41 : (1976) 2 S. C. C. 291 : A. I. R. 1976 S. C. 242; *R. S. Dabhalkar* v. *State of Maharashtra*, 1974 Lab I. C. 165 : (1974) 1 S. C. C. 317 : (1974) 2 S. C. R. 216 : A. I. R. 1974 S. C. 259; *Mahammad Sunjat Ail* v. *Union of India*, 1974 Lab I. C. 1103 ; (1925) 3 S. C. C. 76 : (1975) 1 S. C. R. 449 : A. I. R. 1974 S. C. 1631; *Mohammad Bhakar* v. *Krishna Reddy*, 1970 Serv. L. R. 768; *The Tamil Nadu Education Department Ministerial and General Subordinate Services Association* v. *State of Tamil Nadu*, (1980) 1 S. C. J. 551 : (1980) 1 S. C. R. 1026 : (1980) 3 S. C. C. 97 : 1980 Lab I. C. 211 : (1980) 2 M. L. J. (S. C.) 25 : A. I. R 1980 S. C. 379.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to G. O. Ms. Nos. 2319 Agri. (A. H. II), dated 19th October, 1981 and quash the same.

M. R. Narayanaswami for *K. Venkataraman*, *D. Rajasekar* and *G. Venugopal*, for Petitioner.

The Government Pleader *N. C. Raghavachari* for *N. S. Varadachari*, *M. V. Ramaswami*, *N. C. Ramesh*, *B. R. Dolia*, *Sundar* of *Aiyar*, *Dolia* and *M. Sukumar*, for Respondents.

The Court made the following.

ORDER.—In W. P. No. 254 of 1982 the petitioner is one C. Kannan. The petitioner in W. P. No. 383 of 1982 is the Tamil Nadu Livestock Inspectors' Association represented by the General Secretary. The prayers in both the writ petitions are identical. The petitioners have asked for the issue of a writ of *certiorari* to quash G O. Ms. No. 2319 Agricultural (A. H. II) dated, 19th October, 1981. The Tamil Nadu Livestock Inspectors' Association represented the interest of Livestock Inspectors, Grade I and Grade II in the Animal Husbandry Department of the State Government and other like Corporations in the State. Kannan is a Livestock Inspector, Grade II in the Animal Husbandry Department of the Tamil Nadu Government.

2. The facts leading to the two writ petitions may be stated as follows: It is necessary for the purposes of understanding the case of the petitioners to set out the structure of the Animal Husbandry Department The Animal Husbandry Department is what is called the Tamil Nadu Animal Husbandry Subordinate Service. This service consists of two wings *viz.*, Veterinary and Livestock Inspectors carrying a salary of Rs. 600-30-750-35-890-10-1050. Below then come Veterinary Supervisors Ordinary Grade in the scale of Rs. 450-20-590-20-740-30-300. The other wing consists of Livestock Inspectors, Grade II carrying a salary of Rs. 350-10-420-15-600. Above the Livestock Inspectors, Grade II come Livestock Inspectors Grade I, who are posted as Extension Officers, Animal Husbandry on a salary of Rs. 450-20-590-25-740-30-800 The General educational qualification required for appointment as Livestock Inspector, Grade II, is a pass in the S. S. L. C. Examination and in the one year certificate course in the Animal Husbandry conducted by the Veterinary College, Madras. In the hierarchy of the Regional set up of Directors of Animal Husbandry there are Veterinary Assistant Surgeons, who came above the Livestock Supervisors. It is the petitioner's case that for nearly twenty-five years, the extension work in the Animal Husbandry in Panchayats was being entrusted to and handled by Livestock Inspectors. In other words, the Inspectors, Grade I are also posted as Extension Officers, Animal Husbandry in the Panchayat Unions. But, the Veterinary Graduates made representations to the

Government that they should be appointed as Extension Officers in the Panchayat Unions replacing Livestook Inspectors Grade I. The Frst Pay Commission and the Administrative Reforms Commission considered the desirability of appointing Veterinary Assistant Surgeons as Extension Officers (Animal Husbandry) in Panchayat Unions and were of the opinion that Livestock Inspectors, Grade I were best suited to attend to extension work in the Animal Husbandry in Panchayat Unions and the Veterinary Assistant Surgeons, who were over-qualified, would be unsuitable to be posted as Extension Officers, Animal Husbandry. Accordingly the Government, more than once rejected the representation of the Veterinary Assistant Surgeons for being appointed as Extension Officers (Animal Husbandry) in Panchayat Unions. However, on 19th October, 1981, the Government issued G. O. Ms. No. 2319, Agril. (A. H. II) department, directing the posting of the Veterinary Graduates in the posts of Extension Officers (Animal Husbandry) in Panchayat Unions. It is in these circumstances that the two writ petitions have been filed.

3. Mr. M. R. Narayanaswami, learned counsel for the petitioners argued that ever since 1957, Livestock Inspectors, Grade I, were being appointed as Extension Officers (Animal Husbandry) in Panchayat Unions. The system has been in vague for the last twenty-five years. The Veterinary Assistant Surgeons have been making various attempts to persuade the Government to appoint them as Extension Officers (Animal Husbandry) in the place of Livestock Inspectors, Grade I. However, the Government had, till the date of the passing of the impugned Government Order, rejected the representations of the Veterinery Assistant Surgeons. The Government did so on the basis of the recommendations of the Frst Pay Commission, the Administrative Reforms Commission and the report of the Director of Animal Husbandry. All these authorities were of the view that the qualifications of the Veterinary Assistant Surgeons were too high to be appointed as Extension Officers. It would be uneconomic to appoint Veterinary Assistant Surgeons as Extension Officers, Animal Husbandry Further, if the Veterinary Assistant Surgeons were appointed as Extension Officers (Animal Hsubandry) in the place of Livestock Inspectors, Grade I, there would be a stagnation of Livestock Inspectors, Grade I since they have no other avenue of promotions whereas the Veterinary Assistant Surgeons can look forward to other avenues of promotion. The result of the impugned Government Order would be that Livestock Inspectors, Grade II would be deprived of their right to promotion and it would take eight years for a Livestock Inspector, Grade II, to become a Livestock Inspector, Grade I. Therefore, if the Livestock Inspectors, Grade I are not appointed as Extension Oficers, (Animal Husbandry) the chances of promotion of Livestock Inspectors, Grade II would be greatly affected. Further, the impugned Government Order is vitiated by arbitratiness and unfairness in action on the part of the Government and is therefore hit by Article 14 of the Constitution of India. The Government have not borne in mind the reports of the Frst Pay Commission, the Administrative Reforms Commission and the Director of Animal Husbandry as well as the fact that on previous occasions, the Government, have, after due consideration of the representations made by the Veterinary Assistant Surgeons, rejected their request.

4. Mr. Narayanaswami emphasised upon the fact that Mrs. L. D. Padalkar, who has filed the counter-affidavit on behalf of respondents 1 and 2 had hereself recommended on an earlier occasion that it would be uneconomic to appoint Veterinary Assistant Surgeons as Extension Officers. (Animal Husbandry.).

5. Mrs. Padalkar, who is the present Director of Animal Husbandry and the second respondent herein has filed a counter-affidavit on behalf of respondents 1 and 2. It is stated that prior to 1957 Veterinary Assistant Surgeons were appointed as Extension Officers (Animal Husbandry) on par with the pattern and style prevalent in other States and also in conformity with the qualifications and status of other Extension Officers working in each Block prior to the formation of Panchayat Unions throughout the State. However, in the year 1957, there was a dearth of qualified Veterinary Graduates. Consequently the Government took a decision to post Vetreinary and Livestock Supervisors and Livestock Inspectors, Grade I as Extension Officers.

This arrangement was purely temporary. However, now on account of the increased intake or increased out-turn of veterinary graduates every year from the Veterinary College, qualified hands are now available for appointment as Extension Officers. The stated circumstances, which existed in 1957 have now completely changed. Further, the emphasis in the policy of the State has been on the development of rural economy, new techniques, equipments, preservation methods etc., have been introduced in the Department of Animal Husbandry. Consequently qualified hands are required to man the office of the Extension Officers, Animal Husbandry. Further, the impugned Government Order will not result in reversion of Livestock Inspectors, Grade I to Grade II as their rights are amply protected by the Government Order. It is also contended in the counter-affidavit that the opportunities of promotion of Livestock Inspectors, Grade II would not be affected. Every year vacancies arise in Livestock Inspectors, Grade I due to retirement and resignation as well as creation of new posts. By G. O. No. 1208, Agriculture Department (A. H. VI) dated 18th May, 1981, the Government have sanctioned the establishment of two intensive cattle development projects in South Arcot and Chenglepattu Districts. This has resulted in the creation of 104 posts of Livestock Inspector, Grade I. It is further stated in the counter-affidavit that on completion of ten years of service, a Livestock Inspector, Grade II will be automatically advanced as Livestock Inspector Grade I (Advance) and the scale of pay of both the posts of Livestock Inspector Grade I (Techniques) and Livestock Inspector (Advance) Grade II are said to be the same. According o the repondents, the veterinary Graduate has the technical knowledge and he can generate and pool resources and encourage men to have self-employment in the Animal Husbandry sector in the light of the policy of the Government above stated and to develop rural economy. It is further asserted that the impugned order is not the result of any arbitrary decision. The Government have considered all aspects of the matter and taken a policy decision. In the circumstances, according to the counter affidavit the Writ Petitions have to be dismissed.

6. In W. P. No. 254 of 1982 the respondents 3 to 6 have been added as additional respondents. Respondents 3 and 4 are represented by Mr. N. C. Raghavachari and respondents 5 and 6 are represented by Messrs. Aiyar and Dolia. Mr. N. C. Raghavachari has taken a preliminary objection as regards the maintainability of the Writ Petition No. 385 of 1982, where the petitioner is the Tamil Nadu Livestock Inspectors Association. The contention of the learned counsel was that the Association as such, is not an aggrieved person and consequently has no *locus standi* to file the said Writ Petition. It may be mentioned at this stage, the learned Advocate-General, who appeared for respondents 1 and 2 and Mr. Sundar, who appeared for respondents 5 and 6, had not raised any contention regarding the maintainability of the Writ Petition No. 385 of 1982. I do not think there is any merit in the preliminary objection raised by Mr. N. C. Raghavachari. It cannot be said that the Tamil Nadu Livestock Inspectors' Association, which is composed of Livestock Inspectors Grade I and Grade II have no manner of interest in the subjectmatter of the writ petition. It is not disputed that the Association is registered under the Societies Registration Act for taking care of the interests of its members in general. Therefore, the question whether the discontinuance of the practice, which has admittedly existed for nearly twenty-five years, of appointing Livestock Inspectors, Grade I as Extension Officers, (Animal Husbandry) would adversely affect the members of the Association or not is a matter of general interest so far as the Association is concerned. If the discontinuance of such a practice by the Govenment would detrimentally affect the members *viz.*, the Livestock Inspectors Grade I and Grade II, the Association representing as it does, the general interest of the members, will be entitled to take up the cause of the members in general and agitate the same in Court. Undoubtedly, originally there was a theory that to maintain a petition under Article 226 of the Constitution of India, the individual person aggrieved must approach the Courts for appropriate

relief and a third party who might only be indirectly concerned in the subject matter of the proceedings cannot maintain a writ petition. However, this theory has been exploded and can be said to have vanished by some of the recent decisions of the Supreme Court.

7. Mr. Raghavachari relied heavily on the decision by Ismail, J., as he then was, in *The North Arcot District Pawn Brokers' Association* v. *Secretary to Government of India*[1]. The Madras Financiers and Pawn-Brokers Association and one Hansraj filed two writ petitions, W. P. Nos. 2611 and 2612 of 1970 on the file of this Court. They prayed for the issue of writs of *mandamus* restraining the Union of India, Ministry of Finance, New Delhi and the Collector of Central Excise, Madras from proceeding with the enforcement of Gold Control Trade Notices 6 and 7 of 1970 dated 18th June, 1970 and 27th July, 1970, respectively, said to have been issued by the Collector of Central Excise, Madras. The contention was that the provisions contained in the Gold Control Act, 1968 did not apply to the pawnbrokers. One of the contentions raised before the learned Judge was that the Writ Petition filed by the pawnbrokers' Association was not maintainable. The learned Judge held as follows:

> "It is well-established that only a person whose rights are alleged to have been threatened or transgressed or on whom obligations are imposed by any statute can approach this Court invoking the jurisdiction of this Court under Article 226 of the Constitution of India. It is not the case of any of these Associations that the Association as such has been called upon to discharge any obligation or perform any duty imposed by the Gold Control Act. Therefore, the said Association cannot invoke the jurisdiction of this Court under Article 226 of the Constitution of India".

The learned Judge followed the decision of Ramaprasada Rao, J., as he then was, in *The Polur Town Panchayat Tax Payers Association* v. *The Polur Town Panchayat and others*[2], in respect of a Writ Petition filed by the Polur Town Panchayat Tax-payers Association challenging the levy of the tax made by the Panchayat. The learned Judge in the later case had followed an earlier Bench decision of this Court in W. A. Nos. 49 to 52 and 58 to 60 of 1963. No doubt, these decisions certainly support Mr. Raghavachari in his preliminary objection as regards the maintainability of the Writ Petition.

8. Before I deal with the later decisions of the Supreme Court, which have rendered the above decisions absolete, it is necessary to emphasise upon the fact that the Livestock Inspector's Association, Grades I and II is a society registered under the Societies Registration Act. Under section 6 of the said Act every society can sue or be sued in its name and the provisions of the Act make the society a legal entity by itself. It has a separate existence in the eye of law and can act in its own name and in the manner prescribed by the Act and theretore the said Association is an independent legal person. It was therefore conceded by Mr. Raghavachari that the Association as such can sue and be sued in its name. The only other question is, whether the writ petitions can be dismissed on the ground that the legal right of the Association as such is not affected by the impugned Government Order. In this connection, it is necessary to refer to the decision of the Supreme Court in *F. C. K. Union* v. *Union of India*[1]. The Union of the workers of the Fertiliser Corporation, Sindri, which is a Trade Union registered under the Trade Unions Act along with others filed writ petitions in the Supreme Court under Article 32 of the Constitution of India challenging the legality of the sale of certain plants and equipments of the Sindri Fertilizer Factory whereby the highest tender submitted by the person in a sum of Rs. 4.25 crores was accepted. The reliefs sought in the writ petition were that the Corporation should be directed not to sell away the plant and equipment, that they should be asked to withdraw their decision to sell the same and that the said decision should be quashed as being illegal and unconstitutional. The learned Attorney-General, on behalf of the Union of India,

1. (1975) 1 M. L. J. 290.
2. W. P. No. 2197 of 1972 dated 3rd April, 1973.

1 (1980) Lab. I. C. 1367 : (1981) 1 S. C.C. 568: (1981) 2 S. C. R. 52 : (1981) 2 S. C. W. R. 18 : A. I. R. 1981 S. C. 344.

raised a preliminary objection to the maintainability of the writ petition on the ground that the petitioners have no *locus standi* to file the petition inasmuch as their right had not been affected. Chandrachud, CJ., dealing with the question as regards the maintainability of the writ petition observed as follows :

"But we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental right is not always to be confused with the *locus* to bring a proceeding under Article 3 . These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The question whether a person has the *locus* to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of *locus* to initiate a proceeding, be it under Article 226 or Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is diffctly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective because the Parliamentary control of public enterprises is "diffuse and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or *mala fide.*"

9. Krishna Iyer, J., who particularly dealt with the question as regards access to justice particularly under Article 226 of the Constitution of India in detail, observed, as follows :

"Last there should be misapprehension we wish to keep the distinction clear between the fundamental right to enforce fundamental rights, and the rights and the interest sufficient to claim relief under Article 226 and even relief under Article 226 and even under other jurisdictions. The learned Attorney-General almost agreed, under pressure of compelling trends in the contemporary law of procedure, that Article 226 may probably enable the petitioner to seek relief if the facts suggested by the Court hypothetically existed. Shri A. K. Sen, also took up a similar position. I will put aside Article 32 for a moment and scan the right under Article 226. There is nothing in the provision (unlike under Article 32) to define 'person aggrieved', 'standing' or 'interest' that gives access to the Court to seek redress...

"Law as I conceived it, is a social auditor and this audit function can be put into action only when some one with real public interest ignies the jurisdiction, we cannot be scared by the fear that all and sundry will be litigation happy and waste their time and money and the time of the Court through false and frivolous causes. In a society where freedoms suffer from atrophy and activism is essential for participative public-justice, some mistakes have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process who cannot be repelled from it by narrow pedantry now surrounding *locus standi.*"

"We have no doubt that in competition between Court and streets as dispenser of justice the rule of law must win the aggrieved person for the law Court and wean him from the law-less street. In simple terms, *locus standi* must be liberalised to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interest of public-minded citizens or organisations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets".

"Public interest litigation is part of the process of participative justice and 'standing' in civil litigation of that pattern must have liberal reception, at the judicial door-

steps. The floodgates argument has been assailed by the Australian Law Reforms Commission........ If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any of the 660 million people of the country, the door of the Court will not be open for him. But he belongs to an organisation which has special interest in the subjectmatter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered, I, therefore, take the view that the present petition would clearly have been permissible under Article 226.

(See Judgments of Krishna Iyer, J., in *Bar Council of Maharashtra* v. *M. V. Dalhalkar* and *Bar Council of Maharashtra* v. *M. V. Dalhatra*[1].

10. A similar question arose again before Krishna Iyer, J., in *A. B. S. K. Sangh (Rly).* v. *Union of India*[2]. Akhil Bharatiya Soshit Karamchari Sangh (Rly.,) challenged by way of writ petitions under Article 32 of the Constitution of India the validity of ten circulars issued by the Railway Board on the promotion of candidates belonging to Schedule Castes and Tribes. A technical point was taken in paragraph 3, where the learned Judges observed as follows :

"A technical point is taken in the counter affidavit that the 1st petitioner is an unrecognised association and that, therefore the petition to that extent, is not sustainable: It has to be overruled. Whether the petitioners belong to a recognised union or not, the fact remains that a large body of persons with a common grievance exist and they have approached this Court under Article 32. Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people oriented, and envisions *pocess to justice* through "cless actions", "public interest litigation" and "representative proceedings". Indeed, little Indians in large numbers seeking remedies in Courts through collective proceedings; instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of "cause of action" and "person aggrieved" and individual litigation is becoming obsolescent in some jurisdictions It must fairly be stated that the Attorney-General has taken no objection to a non-recognised association maintaining the writ petitions".

11. The question of *locus standi* again loomed large in the Judges' Transfer Case *S. P. Gupta and others* v. *President of India and others*[1]. In that case, Bhagwati, J., observed as follows :

"The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entilement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when legal scene and public law had not yet been born. According to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress ... ."

The individual who moves the Court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of

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1. (1976) 2 S. C. C. 291: (1976) 2 S. C. R. 48 A. I. R. 1976 S. C. 242: (1975) 2 S. C. C. 702. (1976) 1 S.C.R. 306 : (1976) 2 S. C. J. 127 : A. I. R. 1975 S. C. 2092.

2. (1980) Lab. I. C. 1325: (1980) 1 S. C. J. 754 : (1981) 1 S. C C. 246 : (1981) 2 S. C. R. 185 : (1981) I L. L. J. 209 : A. I. R. 1981 S C. 298.

1. (1981) S. C. C. (Supp) 87 : A. I. R. 1982 S. C. 149.

political motivation or other oblique consideration, the Court should not allow itself to be activised at the instance of such person and must reject his application at the threshhold, whether it be in the form of a letter addressed to the Court or even in tne form of a regular writ petition filed in Court.

........As a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of judicial redress. This rule in regard to *locus standi* thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the Courts over the years. Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons...... There is a vital distinction between *locus standi* and justiciability and it is not every default on the part of the State or a public authority that is justiciable."

The learned Judge further held :

"There can be no doubt that practising lawyers have a vital interest in the independence of the judiciary and if any unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, they would certainly be interested in challenging the constitutionality or legality of such action. They had clearly a concern deeper than that of a busy-body and they cannot be told off at the gates."

Therefore, it is a clear, that the rule laid down by Ismail, J., as he then was, in *N. A. District Pawn Broker's Association* v. *Secretary to Government of India*[1], that only a person, who suffered a specific legal injury by reason of threatened violation of his legal right or legally protected interest, who could bring an action by a regular writ petition to be filed has been described as a rule of ancient vintage and as arisen during an era when private law dominated the legal scene and public law had not yet been born. Consequently, the rule has become obsolete. In this case, it cannot be said that the Livestock Inspectors, Grades I and II cannot be said to be wayfarers or officious interveners without any interest or concern over the subject matter of writ petition. The Association as such representing the body of Livestock Inspectors, Grades I and II are really interested in safeguarding the welfare of its members. If therefore by the impugned notification the rights of any of members of the Association have been prejudiced or excised without the authority of law by any act on the part of the State Government, certainly it would be open to the Association to come forward and protect the rights of its individual members, whom it represents. It cannot be said that each and every one of the Livestock Inspectors, Grades I and II must come forward, spend money and file individual writ petitions. I therefore over-rule the preliminary objection raised by Mr. Raghavachari.

12. The next question to be considered is, whether the petitioners are entitled to any relief. In this context, it is necessary to refer to certain admitted facts. It is not disputed that Livestock Inspectors were directed to be appointed as Extension Officers in Panchayat Unions only in 1957 as a temporary measure though no doubt ever since then they were

1. (1975) 1 M. L. J. 290.

being appointed as Extension Officers. By G.O. Ms. No. 2130, Food and Agriculture, dated 15th July, 1957, the Government directed that Veterinary Assistant Surgeons available in the Extension Service areas shall be withdrawn and in their place, the Veterinary and Livestock Inspectors should be posted to replace the existing Extension Officers for Animal Hubandry in the National Extension service Blocks in the State. This Government Order took note of the fact that while 366 Veterinary Assistant Surgeons would be required to implement the various schemes and activities of the Animal Husbandry Department only 232 Veterinary Assistant surgeons were then available in the Animal Husbandry Department, and 72 in the National Extension Service areas. In view of this the Government directed that out of the 72 Veterinary Assistant Surgeons available in the National Extension Service areas 62 shall be withdrawn. This was followed by G. O. Ms. No. 3408, dated 4th December, 1957. By this Government Order the Government referred to G. O. No. 2130, Food and Agriculture, dated 15th July, 1957, by which the Government had ordered that Veterinary and Livestock Inspectors should be placed under the Animal Husbandry Department Veterinary Assistant Surgeonse and accorded sanction to the employment of 71 Veterinary and Livestock Inspectors. From the above Government Orders it is clear that, as contended, by the respondents in the counter-affidavit, there was a dearth of veterinary graduates in the year 1957, which necessitated the Government. withdrawing Extension Officers (Veterinary Assistant Surgeons) from the extension service areas and replacing them by Livestock Inspectors, Grade I. This practice has continued till the impugned Government order was passed. It is also not disputed that these arrangements were only temporary. The respondents have not challenged the statement of the petitioners that the first Pay Commission, as early as in 1976, made a recommendation that persons who are less qualified than the veterinary graduates should be appointed as Extension Officers. It will be useful to refer to the actual report of the first Pay Commission, which is relied on by Mr. M. R. Narayanaswami. The passage, occurring at page 65 in the printed volume of the report of the Madras Pay Commission, 1959-60, reads as follows :

"We feel that with the existing facilities for the training of Veterinary Graduates, it will not be possible to man all the posts of Extension Officers for Animal Husbandry with Veterinary Assistant Surgeons. In any case, for the type of work which an Extension Officer has to do, perhaps an agency less technically qualified and therefore, less costly would suffice. We discussed with the Director of Animal Husbandry the desirability of reviewing the two-year diploma course in Animal Husbandry. The Director is against the revival of the disploma course as he feels that there should not be any lowering of the standards of veterinary education. While the expert advice of the Director is entitled to all respect, we feel that a more realistic attitude in regard to the man-power requirements of the department in the context of the third Five-Year Plan is clearly needed. Though all the posts of Extension Officers for Animal Husbandry are expected to be held by veterinary graduates, most or them are now in fact being held only by Veterinary Livestock Inspectors, who are diploma holders and some even by Stockmen, who have had only eleven months training' With the progressive increase in the number of blocks the staffing position will become even more unsatisfactory. Further, while a Veterinary Assistant Surgeon may be needed for a Veterinary dispensary or hospital, it will perhaps be a waste of their highly specialised professional training to entrust them with extension work which consists merely in the discrimination of information in regard to proper feeding and management of cattle, early diagnosis of cattle diseasse and the provision of first-aid, etc. We therefore, consider that there is *prima facie* a need for the revival of the two-year disploma course in Animal Husbandry, and that these disploma holders could progressively replace the Stockmen as Extension Officers in Animal Husbandry". It is thus clear that 'even according to the first Pay Commission, all the posts of Extension Officers for Animal Husbandry were to be

held, by veterinary graduates though, at that time they were being held by Livestock Inspectors due to paucity of veterinary graduates. It is equally clear that the Pay Commission was conscious of the fact the qualifications of Livestock Inspectors who had underwent only eleven months' training would not be sufficient and they suggested the revival of the two-year diploma course to enable such diploma holders to be appointed as Extension Officers in the place of Veterinary Assistant Surgeons even though the Director of Animal Husbandry did not accept the proposal. Thus. the report of the Pay Commission does not support Mr. Narayanaswami, in his argument that the first Pay Commission has recommended the retention of the Livestock Inspectors as Extension Officers. On the other hand, they had only suggested that persons more qualifide than the Livestock Inspectors but less qualified that the veterinary graduates could be appointed to man the posts of Extension Officers. Similarly there is no dispute the Director of Animal Husbandry gave a report in 1976 (*i. e.*, on 9th September, 1976) to the affect that the posting of Veterinary Assistant Surgeons would only result in a collossal waste of human and financial resources and that it would only pave the way for Veterinary Assistant Surgeons to get out of touch with the usual practice and thereby finding themselves within a few years useless. On the other hand, the Director of Rural Development, Madras expressed his view as early as on 5th June, 1976, that veterinary graduates would be better suited to be appointed as Extension Officers. He had referred to the fact that the Animal Health Intelligence reporting which used to be one of the fundamental duties of the Touring Veterinary Assistant Surgeons is now down in an unsatisfactory manner. He had also stated that the Livestock and poultry development has grown up to such a scale that higher technical knowledge is required by the Livestock farmers whether it is poultry dairying, piggery etc., and the veterinary graduates during the course of education in Veterinary Science study extension as special subject. He had also emphasised upon the fact that with the present approach of Integrated Rural Development, wherein such emphasis is placed on the use of the highest scientific knowledge and technology for the uplift of the rural people, it is highly essential to post Veterinary Assistant Surgeons as Extension Officers (Animal Husbandry) in blocks. I am unable to get any assistance from the report of the Administrative Reforms Commission at pages 44 to 46 and 101, to which my attention has been drawn by the learned counsel for the petitioner. There is nothing in the said report which goes against the tenor of the impugned government Order. It is true that on earlier occasions, representations were made by the Veterinary Assistant Surgeons that they shouldbe appointed as Extension Officers, Animal Husbandry in Panchayat Unions but that was not accepted by the Government. However, the fact that on an earlier occasion the Government did not accept the representation of the Veterinary Assistant Surgeons could not mean that the Government is debarred from revising its policy.

Mr. M. R. Narayanaswami, learned counsel for the petitioner mainly emphasised upon the fact that the impugned Government Order has to be struck down as arbitrary, in view of the fact that the Government had not considered the various matters touching upon the subject-matter and the fact that on earlier occasions the representations of the Veterinary Assistant Surgeons for being appointed an Extension Officers has not been accepted. In this connection, the learned counsel referred to the decision of the Supreme Court in *K. K. Rajendran* v. *State of Tamil Nadu*[1]. He invited my attention particularly to paragraphs 7, 32, 33 and 34. I have carefully gone through the said decision and I am unable to see how far the said decision applies to the facts of the present case. The paragraphs to which the learned counsel drew my attention deal with the fact that whether a post could be abolished should essentially be a matter for the Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the Court. The decision to abolish the post

1. (1982) 2 S.C. C. 273 : 1982 Lab. I. C. 876 : (1982) 1 S. C. J. 604 : A. I. R. 1982 S. C. 1107.

should, however, be taken in good faith and be not used as a cloak or pretence to terminate the services of a person holding that post. The Supreme Court further held that in case it is found on considera-tion of the facts of a case that the aboli-tion of the post was only a device to terminate the services of an employee, the abolition of the post would be liable to be set aside. We are not concerned here with the abolition of the post. The learned counsel then referred to the fact that the deponent of the counter-affidavit, Mrs. L. D. Padalkar had herself made a recommendation in 1976 that Veterinary Assistant Surgeons should not be appointed on the ground that it would be a collossal waste of time to appoint Veterinary Assistant Surgeons as Extension Officers and curiously she has now filed a counter-affidavit stating that Veterinary Assistant Surgeons alone were qualified to be appointed an Extension Officers. I do not find that there is any rule of law or principle which prevents Mrs L D. Padalkar from taking a view of the matter, dissenting from the opinion found by her earlier, according to the circumstances of the situation. She has stated in the counter-affidavit that the situation in 1976 was quite different from what it is today. Even otherwise, nothing prevents an Officer of the Government from taking a different view of a matter if he or she finds that at the time when the decision is taken, a particular line of approach is called for. In the counter affidavit it is stated categorically" that the situation prevalent in the State twenty years back when Livestock Inspectors were posted as Extension Officers (Animal) Husbandry) has now completely changed".

The people have become more and more conscious about the rearing of quality live-stock for better profit and progress. New techiniques, equipments, preservation methods, breeds, etc., have been introduced and propularised. A highly sophisticated service in the fields of Animal Husbandry (including preventive and curative health cover, feeding, breeding and management, is expected by the ryots. Consequent to the efforts of the Department and other Develop-ment agencies, the animals of high quality and price are being reared on commercial lines, by the people and they are demanding better technical know-how. Due to the multiplicity of the sources of information, the message on Science and Tecchnology, Research and Development in Animal Husbandry reach the public quickly, creating doubts and requiring clarification on many pointed issues. The rural people look to the Animal Husbandry extension workers for the clarity of views; upto date knowledge on Research and Development. Animal Husbandry extension workers with a capacity to go deep into the problems and subject will alone be able to clear the genuine doubts of the public arising out of availability of information on latest developments. The real role of the Extension Officer can be per-formed by the persons with adequate technical and academic qualifications. Therefore, veterinary graduates alone will be suited to work as Extension Officers in the field of Animal Husbandry". Again it is further stated in pragraph 11 of the counter-affidavit that "the veterinary graduate, has the technical knowledge and he can generate and pool resources and encourage men to have self-employment in the Animal Husbandry sector. With the various cast intensive schemes to improve the quality of Livestock, the appropriate liaison officer to function as Extension Officer (Animal Husbandry) is a veterinary graduate. Our rural people should not be denied the high level technology which could be popularised and put to actual use through veterinary graduates in panchayat unions for their Livestock". In the light of these statements it is futile on the part of the learned counsel for the petitioner to contend that the impugned Government Order is vitiated by the vice of arbitrariness so as to be struck down by invoking the enlarged scope of Article 14 of the Constitu-tion of India as enunciated in paragraph 11 in the decision in *Ramanadayaram Shetty* v. *The International Airport Authority of India*[1].

13. Mr. Narayanaswamy then contended that the basis of the promulgation of the impugned Government Order was the fact that the post of extension Officers, Agriculture were being held by Agricultural Graduates The Extension Officers, Agricultural are no longer being held by agricultural graduates. The basis behind the impugned Government Order thus having disappeared the impugned

1. (1979) 3 S. C C. 489 : A. I. R. 1979 S. C. 1628.

Government Order is liable to be quashed. This argument is devoid of merits. A reading of the impugned Government Order does not show that the basis of the Government Order was the fact that posts of Extension Officers, Agriculture were being held by Agricultural Graduates. It merely states that the Government have desired that the veterinary graduates may be appointed as Extension Officers, Animal Husbandry in the panchayat unions "as in the case of posts of Extension Officers, Agriculture, which are held by Agricultural Graduates. Apart from this, the learned Advocate-General has stated that posts of Extension Officers, Agriculture are even how being manned by Agricultural Graduates and they are directly under the control of the Government. In my opinion, neither the reference to the fact that the posts of Extension Officers, Agriculture are held by the Agricultural Graduates nor the fact that the Extension Officers, Agriculture are no longer held by Agricultural Graduates, even if proved, can in any manner vitiate the Government Order.

Mr. Narayanaswami then took exception to the statement in the impugned Government Order that Livestock Inspectors, Grade I would be upgraded to the cadre of Veterinary Assistant Surgeons in the Tamil Nadu Animal Husbandry "*Subordinate Services*" and stated that there cannot be any upgrading of Livestock Inspectors, Grade I to the Animal Husbandry Subordinate Service. The learned Advocate-General plainly stated at the Bar that the use of the word 'Subordinate, in that paragraph was a mistake and that what the Government meant was that Livestock Inspectors, Grade I would be upgraded to the cadre of Veterinary Assistant Surgeons in the Tamil Nadu Animal Husbandry Services.

14. The next contention of Mr. Narayanaswamy was that with the appointment of Veterinary Assistant Surgeons as Extension Officers, Grade I, there would be deployment of Livestock Inspectors, Grade I. There is no substance in this contention as well. It is stated in the Government Order itself that posts of Livestock Inspectors in the Veterinary Sub-centres would be upgraded to the grade of Livestock Inspectors, Grade I so that Liverstock Inspectors, Grade I on reversion from the posts of Extension Officers (Animal Husbandry) can be posted in those posts. The Government Order further clearly directs that whenever the Livestock Inspectors, Grade I on relief from the post of Extension Officers (Animal Husbandry) are posted in the Veterinary Key Village Sub-Centres, the existing posts of Livestock Inspectors, Grade II in the Sub-centres be upgraded to that of Livestock Inspectors Grade I so long as the Livestock Inspectors Grade I are holding the posts. The Government have also directed that the posts of Extension Officers (Animal Husbandry) in the Panchayat Unions which are now in the Grade of Livestock Inspectors Grade I be upgraded to the cadre of Veterinary Assistant Surgeons in the Tamil Nadu Animal Husbandry Subordinate Service.

15. Similarly there is no substance in the argument of Mr. Narayanaswami that the Livestock Inspectors, Grade II would also be affected. In G. O. No. 1208, Agriculture Department (AH VI), dated 18th May, 1981, Government have sanctioned the establishment of two Intensive Cattle Development Projects in South Arcot and Chingleput Districts and for their implementation, the Government have created 104 posts of Livestock Inspectors Grade I. Similar opportunities will occur in future years also similarly as has been pointed out in the counter affidavit, vacancies are likely to occur in Livestock Inspectors Grade I posts due to retirement, resignation as well as creation of new posts for implementing part II and new schemes under five year plans. There is another important fact, which is not disputed, that on completion of ten years of service, Livestock Inspectors Grade II will be advanced to Livestock Inspectors Grade I (Advanced). The scale of pay of both the posts-Livestock Inspectors Grades I and II is the same. It is further stated on behalf of the respondents and that is not disputed that the holders of posts of Livestock Inspector's Grade I (Advanced) are also allowed Livestock Attendants' extra amount

of Rs. 13 per month which the normal Grade I Livestock Inspectors are not getting. Therefore, even assuming that chances of promotion constitute conditions of service, it is amply made out that the opportunities for promotion of Livestock Inspectors Grade II are not in any way affected.

16. Mr. Narayanaswami made repeated emphasis that for the last twenty-five years the practice of appointing Livestock Inspectors, Grade I as Extension Officers has been prevalent and therefore, a change from the said practice cannot be considered to be rational. There is no merit in this contention. So long as the practice has not been converted into a Rule which is binding on the Government, the fact, that the practice has been followed for twenty five years, cannot clothe the Livestock Inspectors with any vested right to be appointed as Extension Officers.

The mere discontinuance of a practice cannot amount to an injury to any legal right. Chandrachud, CJ., has observed thus in *R. K. Khandelwal* v. *State of Uttar Pradesh*[1] is :

> "But apart from that, discontinuance of a mere practice cannot sustain a charge of injury to legal rights. The practice had not ripened into a Rule and the University was under no obligation to admit only those who had passed their D. C. H. Examination".

So, unless the Livestock, Inspectors Grade I have any legal right to be appointed as Extension Officers in Panchayat Unions, the impugned order cannot be questioned.

17. Though it is unnecessary for the present purpose, it is but fair that I refer to the citations made by the learned Advocate-General. In *R. S. Dickhar* v. *State of Maharashtra*[2], the Supreme Court has laid down that a rule which merely affects the chances of promotion cannot be regarded as varying a condition of services. Again it has been stated in *Mohamed Thujaj Ali* v. *Union of India*[1], at paragraph 15 :

> "It is true that a rule which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing a condition of service. This proposition can no longer be disputed in view of several pronouncements of this Court on the point and particularly the decision in *Mohammed Bhakar* v. *Krishna Reddy*[2], where this Court, speaking through Mitter, J., said "Any rule which affects the promotion of a person relates to his condition of service". But when we speak of a right to be considered for promotion, we must not confuse it with mere chance of promotion; the latter would certainly not be a condition of service. This Court pointed out in *State of Mysore* v. *G. R. Purohit*[3], that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affects chances of promotion cannot be regarded as varying a condition of service".

18. I am therefore satisfied that the decision in the impugned Government Order cannot be characterised as arbitrary and as having been issued without having regard to the various aspects, which are relevant to be considered on a matter like this. The Government have taken a policy decision, on the basis of relevant materials and it is not for this Court to interfere with the policy decision of the Government in exercise of its powers under Article 226 of the Constitution of India unless it be that the decision arrived at is so arbitrary and unconscionable that it would affect all canons of fair play in State action and unless this Court comes to a conclusion that the decision is absolutely arbitrary or irrational. In this connections, it will be useful to recall the observation of the Supreme Court in *The Tamil Nadu Education Department Ministerial and General*

1. (1982) 1 S. C. J. 50 at. 51 : (1981) 3 S. C. C. 592: A. I. R. 1981 S C. 1673.
2. (1974) Lab. I. C. 165 : (1974) 1 S. C. C. 317 : (1974) 2 S. C. R. 216 : A. I. R. 1974 S. C. 259.

1. (1974) Lab. I. C. 1103 : (1975) 3 S. C. C. 76 : (1975) 1 S. C R. 449 : A. I. R. 1974 S. C. 1631.
2. (1970) Serv. L. R. 768. (S. C.)
3. C. A. No. 2281 of 1965, dated 25th January, 1967 (S. C).

Subordinate Services Association etc. v. *State of Tamil Nadu*[1]. The case dealt with the question of validity of Tamil Nadu G. O. Ms. No. 1948 regarding the integration of District Board staff with Government servants and the introduction of A wing and B wing. The Supreme Court observed in paragraph 17 at page 383 :

> "Sri Govind Swaminathan drove home the point that in some cases even a few hundred 'A' wing members have been passed ever by some one in the 'B' wing far junior to them. Once the principle is found to be rational the fact that a few freak instances of hardship may arise on either side cannot be a ground to invalidate the order or the policy, Every cause claims a martyr and however unhappy we feel to see the seniors of yesterday becoming the juniors of today, this is an area where, absent arbitrariness and irrationality the Court has to adopt a hands-off policy".

It is unnecessary to pursue the discussion on the question that in 1957 only Rs. 3,000 has been allotted for Panchayat Union Extension activities while it is now Rs. 7½ lakhs.

19. The net result is, there are no merits in the writ petitions. The impugned Government Order, which is the result of a policy decision taken by the Government on relevant considerations cannot be characterised as arbitrary or irrational. It does not in any manner affect the rights of the members of the petitioners' Association or the petitioner Kannan. The impugned Government Order protects the rights of Livestock Inspectors Grade I who are likely to be reverted from the posts of Extension Officers by reason of appointment of Veterinary Assistant Surgeons as Extension Officers. I therefore dismiss both the writ petitions, but, in the circumstances, without costs.

20. After I pronounced the judgment, dismissing the writ petitions, Mr. M. R. Narayanaswami, the learned counsel for the petitioners requests for a stay of the operation of the judgment for a period of one month to enable the petitioners to file appeals and move the appellate Court for stay. Mr. Kanagaraj, the learned Additional Government Pleader, opposes, the stay on the ground that the policy decision has already been partly implemented and if that any order of stay is granted, it would cause inconvenience to the administration. In view of the statement made by the learned Additional Government Pleader that the policy decision has already been implemented to a certain extent, I do not think the stay asked for by the learned counsel for the petitioners can be granted.

R. S. —— *Petition dismissed.*

1. (1980) 1 S. C. J. 551 : (1980) 1 S. C. R. 1026: (1980) 3 S. C. C. 97 : (1980) Lab. I. C. 211 (1980) 2 M. L. J. (S. C.) 25 : A. I. R. 1983 S. C. 379,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*K. B. N. Singh, CJ. and S. Padmanabhan, J.*

H. G. Krishna Reddy and Company ... *Appellant**

v.

M. M. Thimmiah and another ... *Respondents.*

Contract—Contract for sale of immovable property for Rs. 1,22,500—Rs. 3,000 received towards sale price and receipt issued—Execution of a separate stamped contract of sale contemplated—Whether concluded contract of sale, can be inferred from the recitals in the receipt.

(B) *Document—Construction — Recitals in receipt relating to advance contemplating a contract of sale on a stamped paper in future—Whether creates a concluded contract of sale.*

(C) *Specific Relief Act (LVII of 1963), section 16 (c)—Decree for specific performance sought—Averment of readiness and willingness to perform the contract necessary in the pleadings.*

(D) *Acceptance—Refund of advance of sale price received without prejudice—Effect.*

* O. S. A. No. 19 of 1977.

24th January, 1983.

On 26th January, 1974, the second respondent executed a receipt for Rs. 3,000 in favour of the first respondent. The receipt recited that a sum of Rs. 3,000 was being received towards the agreed price of Rs. 1,22,500 for the sale of the suit property by the second respondent in favour of the first respondent and that the sale was to be completed within 45 days from the date of the advocate for the first respondent passing the title deeds. Among others, there was a further clause to the effect that the second respondent should execute a regular contract for sale on a stamp paper within 15 days from the date of the receipt and that if the transaction was not or could not be completed within the said period of 45 days or the extended time for any reason, the second respondent should return the advance with interest thereon at 12 per cent per annum from that date. Thereafter in February, 1974 the first respondent sent Exhibit P-4 draft agreement of sale to the first respondent for approval and signature. The second respondent returned the draft suggesting certain amendments. Subsequently some correspondence ensured between the parties. Ultimately on 22nd February, 1974, the counsel for the second respondent wrote to the counsel for the first respondent stating that the second respondent did not propose to keep the contract for sale alive and that he could not execute any agreement for sale. He also returned the sum of Rs. 13,000 which had been paid in all by the first respondent towards the advance of sale consideration. It is common ground that on 28th March, 1974, the first respondent received the cheque for Rs. 13,000 from the second respondent without prejudice to his rights. Under the contract for sale on 1st June, 1974, the second respondent sold the suit property to the appellant for a sum of Rs. 1,10,000. In the circumstances, the first respondent filed the suit for specific performance of the agreement for sale entered into by the second respondent with him in respect of the suit property. The second respondent contended that there was no concluded contract of sale which could be specifically enforced and that the taking back of the advance would disentitle the appellant to enforce the contract. The trial Judge passed a decree in favour of the first respondent for the specific performance of the said contract for sale against the second respondent and the appellant. Hence this appeal.

Held: It is now settled that if a document which is entered into between the two parties and which is relied on as constituting the contract contemplates the execution of a further regular agreement between the parties it is a matter of construction whether the execution of a further contract is a condition of the terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the original agreement should be performed. In the former case, there cannot be any enforceable contract unless the condition is fulfilled or on the ground that the law does not recognise a contract to enter into a contract.

[*Para*. 9]

Another settled principle of law is that when there is a written document followed by further negotiation in the form of correspondence the entirety of ihe correspondence has to be looked into to find out whether there has been a completed contract or not.

[*Para*. 18.]

In the light of the contentions of the parties it is necessary to refer to the entire correspondence that followed Exhibit P-1 to find out whether Exhibit P-1 constituted a concluded contract or not Exhibit P-1-receipt itself is given subject to the terms and conditions mentioned therein. It states that the sale shall be completed within 45 days from the date of the advocate for the first respondent passing the title. The second respondent. has to produce the encumbrance certificate for a period of 13 years prior to the date of Exhibit P-1 and also obtain a receipt of satisfaction of the claim of his brother. The second respondent has also to produce the receipts for payment of all taxes and other demands. Clause 6 of Exhibit P-1 clearly states that if the transaction is not or could not be completed within the said 45 days or the extended time for any reason, the second respondent shall return the amount of advance with interest thereon at 12 per cent. per annum from the date of Exhibit P-1. Clause 7 of Exhibit P-1 states that the second respondent shall execute a regular agreement of sale on stamp paper within 15 days from the date of Exhibit P-1. Though

no doubt, Exhibit P-1 has specified the consideration amount and the property to be sold, a perusal of Exhibit P-1 leaves the impression that a regular agreement of sale on a stamp paper has to be executed within 15 days from the date of Exhibit P-1 and that the said recital is a condition of the bargain between the parties under Exhibit P-1. Further clause 6 of Exhibit P-1 gives an option to the second respondent to return the advance amount with interest at 12% if the consideration could not be completed within 45 days as tipulated thereins. It is not disputed that the second respondent refunded the amount of advance and stated that he could not complete the transaction within as reasonable time. This clause itself would show that Exhibit P-1 was not intended to be a concluded contract. [*Para. 20.*]

From a conspectus of the entire documentary evidence it is clear that there was no concluded contract at all between the parties, that the receipt Exhibit P-1 was not intended to contain the whole of the terms of the bargain, that Exhibit P-4 draft agreement was not accepted and signed by the second respondent and that the parties were only negotiating with suggestions and counter-suggestions and were never at *consensus ad idem.* [*Para. 22.*]

In this case there is absolutely no evidence on the side of the first respondent to prove that he was ready and willing to perform his part of the contract and that such readiness and willingness continued till the date of the decree. It is certainly the duty of the first respondent to have gone into the box and given formal evidence that he was ready and willing to perform his part of the contract and subject himself to be cross-examined. In the absence of the first respondent *(sic)* stating from the witness box, it cannot be found that the first respondent-plaintiff has discharged the duty enjoined on him under section 16 (*c*) of the Specific Relief Act, 1963, entitling him to a decree for specific performance. No doubt it is not specifically clear from the judgment of the trial Court whether the question regarding the readiness and willingness of the first respondent to perform his part of the contract was urged before the learned Judge. It would be certainly open to the appellant to raise that question at the appellate stage. Section 16 (*c*) of the Specific Relief Act, 1963, is prohibitory and a duty is cast on Courts by a public statute that specific performance of a contract cannot be granted in favour of a person unless he offers and proves readiness and willingness to perform his part of the contract. That being the nature of the statute, it would be the duty of the Court to see whether the person who seeks to enforce the contract satisfies the mandatory provision of section 16 of the Specific Relief Act, 1963. [*Para 26.*]

The second respondent had stated that he was not intending to execute the draft contract for sale and that the contract was no longer in existence. Assuming that Exhibit P-1 amounted to a concluded contract for sale the first respondent has accepted the refund amount of Rs. 13,000 knowing full well that the second respondent has cancelled the contract. In the context therefore, the mere conditional acceptance by the use of the words "without prejudice" to his rights under the contract for sale cannot in any manner derogate from the fact that he had acquiesced in the breach of the contract committed by the second respondent.

[*Para. 34.*]

Assuming Exhibit P-1 constituted a concluded contract for sale, the acceptance of the refund amount of Rs. 13,000 by the first respondent waived his right to enforce the contract and his right cannot be preserved merely because he had accepted the amount 'without prejudice' to his right.

[*Para. 35.*]

The first respondent has not gone into the witness box. There is clear evidence to show that the appellant purchased the property for value. As regards notice D. W. 1 has given evidence that he was not aware of the contract for sale, that before purchasing the property, he inspected the property, when one Jayaraman, a gumastha and Athimoolam the watchmen, were present and no business was being carried on then. The first respondent has not gone into the box to rebut the evidence given by D. W. 1. It is borne out by evidence that the first respondent had already taken back the refund amount and consequently even if there had been any such valid and enforceable contract for sale, he has waived his right to enforce the contract. In the circumstances, it has to be held that the appellant is a *bona fide* purchaser for value

without notice of any subsisting contract of sale. [*Para.* 36.]

Cases referred to:—

Ridgway v. *Wharton*, (1857) 6 H. L. C. 238; *Hatzfeld Wildenburg* v *Alexander*, (1912) 1 Ch. 248; *Harichani* v. *Govind*, 17 L. W. 572 : 50 I. A. 25 : 44 M. L. J. 608 : A. I. R. 1923 P. C. 47; *Currimbhoy and Company* v. *Creet*, 37 L. W. 253 : 64 M. L. J. 103 : 60 I. A. 297 : A. I. R. 1943 P. C 29; *Gostho Behari* v. *Surs' Estates Limited*, A. I. R. 1960 Cal. 752; *Shankarlal Narayandas Nandade* v. *New Mofussil Company Limited*, 59 L. W. 370 : (1946) 2 M L. J. 259 : 73 I. A. 98 (2) : A. I. R. 1946 P. C 97; *Deep Chandra* v. *Sajjad Ali Khan*, A. I. R. 1951 All. 93; *Lala Durga Prasad* v. *Lala Deep Chand*, (1954) 1 M. L. J. 60 : 1954 S. C. J. 23 : 1954 S. C. R. 360 : 67 L. W. 945 : A. I R 1954 S. C. 75; *Spottiswoods Ballantyne and Company Ltd.* v. *Doreen Appliances Limited*, (1942) 2 K. B. 32; *Branca* v. *Cobarro*, (1947) K. B. 854 : (1947) 2 All E. R. 101; *Sriramulu* v. *Aswatha Narayana*, (1968) 2 S. C. J. 901 : (1969) 1 M L. J. (S. C.) 6 : (1969) 1 An. W. R. (S. C.) 6 : (1968) 3 S. C. R. 387 : A. I. R. 1968 S. C. 1028; *Bristal, Cardiff and Swansea Aerated Bread Company* v *Mags*, 44 Ch. D. 616; *Hussey* v. *Hone Payne*, 4 A. C. 811; *Baijnath* v. *Kshetrahari Sarkar*, A. I. R. 1955 Cal. 210; *Ardeshir* v. *Flora Sassoon*, (1928) 55 M. L. J. 523 : 55 I. A. 360 : 28 L. W. 257 : A. I. R. 1928 P. C. 208; *Gomathinayagam Pillai* v. *Palanisami Nadar*, (1967) 1 S. C. R. 227 : A. I. R. 1967 S C. 868; *Premraj* v. *D. L. P. Limited*, (1968) 3 S. C. R. 648 : (1968) 2 S. C. J. 951 : A.I.R. 1968 S.C. 1355; *Shiba Prasad Singh* v. *Srish Chandra*, (1949) 2 M. L. J 657 : 62 L. W. 786 : 76 I. A. 244 : A. I. R. 1949 P. C. 297; *Surajmull Nagoremull* v. *The Triton Insurance Company Limited*, 49 M. L J. 136 : 52 I. A. 126 : A. I R. 1925 P. C. 83; *Nexon* v. *Albion Marine*, (1867) L. R. 2 Exc 338; *George Henry Devenport* v *Her Majesty the Queen*, 3 A. C. 115; *Croft* v. *Lumkly*, 6 H. L. C. 672; *Kalai Krishna Tagore* v *Fuzle Ali Chowdhry*, (1883) I. L. R. 9 Cal. 843; *Satyanarayana* v. *Venkataramamurthi*, A. I. R. 1935 Mad. 454; *Chatu Mia* v. *Mt. Sundari*, A. I. R. 1945 Pat. 260; *Doe d Morearaft* v. *Meux*, (1825) 1 Car. and P. 347; *Ganga Dutt Murarka* v. *Kartik Chandar Das*, (1961) 3 S. C. R. 813 : (1962) 2 M. L. J. (S. C.) 161 : (1962) 2 S. C. J. 584 : (1962) 2 An. W. R. (S. C.) 161: A. I. R. 1961 S. C 1067; *Ramesh Chandra* v. *Chunlila*, (1971) 2 S. C. J. 619 : (1971) 2 S. C. R. 573 : A. I. R 1971 S. C. 1238.

Appeal under Order 11, rule 3 read with Order 36, rule 1 of the Original Side Rules of the High Court, Madras, against the appeal from the judgment of N. S. Ramaswami, J., dated 3rd February, 1977 in C. S. No. 213 of 1974.

R. Kesava Iyengar for *K. Yamunan*, for Appellant.

T. R. Ramachandran for *K. S. Varadachari* and *A. Sankaran* and *K. Ramamurthy* and *N. S Nandakumar*, for Respondents.

The judgment of the Court was delivered by

Padmanabhan, J.—This appeal arises out of the judgment and decree for specific performance of a contract for sale passed by this Court in C. S. No. 213 of 1974. The second defendant, H. G. Krishna Reddy and Company is the appellant. The first respondent herein is the plaintiff and the second respondent is the first defendant in the suit. The facts of the case may be set out as follows.

2 On 26th January, 1974, the second respondent executed a receipt, Exhibit P-1 for Rs. 3,000 in favour of the first respondent. The receipt recited that a sum of Rs. 3,000 was being received towards the agreed price of Rs. 1,22,500 for the sale of the suit property by the second respondent in favour of the first respondent. It further stated that the sale was to be completed within 45 days from the date of the advocate for the first respondent passing the title deed. Among others, there was a further clause to the effect that the second respondent should execute a regular contract for sale on a stamp paper within 15 days from the date of the receipt and that if the transaction was not or could not be completed within the said 45 days or the extended time for any reason, the second respondent should return the amount of advance with interest thereon at 12 per cent per annum from that date. Thereafter, in February, 1974 the first respondent sent Exhibit P-4 draft agreement of sale to the second respondent for his approval and

signature. The second respondent returned the draft agreement of sale to the first respondent suggesting certain amendments. Subsequently, some correspondence ensued between the parties. Ultimately, on 22nd February, 1974, the counsel for the second respondent wrote to the counsel for the first respondent stating that the second respondent did not propose to keep the contract for sale alive and that he could not execute any agreement for sale. He also returned the sum of Rs. 13,000 which had been paid by the first respondent towards the advance of sale consideration. It is common ground that on 28th March, 1974, the first respondent received the cheque for Rs. 13,000, from the second respondent without prejudice to his right under the contract for sale. It may also be mentioned that on 10th June, 1974 the second respondent sold the suit property to the appellant for a sum of Rs. 1,10,000. It is, in these circumstances, the first respondent filed the suit for the specific performance of the agreement for sale entered into by the second respondent with him in respect of the suit property.

3. The second respondent in his defence contended that there was no concluded contract for sale of the suit property between the first respondent and him. He further contended that Exhibit P-1 receipt did not by itself constitute a concluded contract, but contemplated a written agreement for sale being entered into between the parties. The counsel for the first respondent did not approve the title of the second respondent and wanted further particulars from the respondent to enable him to pass the title as good. Though the second respondent received a draft agreement for sale and a cheque for a sum of Rs. 10,000 he returned the draft agreement with suggestions for effecting certain amendments. But, the first respondent did not agree to the amendments suggested by the second respondent. It is the further case of the second respondent that he informed the first respondent that he could not give a good title within a reasonable time and stated that if the first respondent would wait for sometime and also give a further sum of Rs. 60,000 for the payment of his debt, he would complete the sale transaction, or else he would treat the contract as cancelled. Since the first respondent did not agree to the terms of the second respondent, the latter cancelled the agreement. Pursuant to the cancellation of the contract for sale, the first respondent also received back the sum of Rs. 13,000. Thereafter, the second respondent sold the property to the appellant for a sum of Rs. 1,10,000.

4. The appellant in its defence stated that it purchased the suit property *bona fide* and for a valuable consideration of Rs. 1,10,000. At the time of its purchase it was not aware that a valid contract for sale, much less a concluded contract for sale existed between the respondents 1 and 2. In March, 1974, the appellant was on the look-out for the purchase of a property and it was informed about the availability for purchase of the suit property. Accordingly, the appellant inspected the suit property and it was not told that any such contract for sale subsisted between respondents 1 and 2. Since the second respondent was prepared to sell the property to the appellant for a sum Rs 1,10,000, provided it paid an advance of Rs. 60,000 the appellant gave an advance of Rs. 60,000 and thereafter concluded the sale transaction under the sale deed, dated 10th June, 1974, by paying the balance amount of Rs. 50,000. The document was registered on 12th June, 1974, Exhibit P-17 being the sale deed. The appellant has further stated that the first respondent was aware of the fact that it was going to purchase the property from the second respondent and yet he did not prevent the appellant from purchasing the property. It is a *bona fide* purchaser for value without notice of the alleged contract for sale between respondents 1 and 2. The appellant has contended that by his conduct the first respondent allowed the appellant to purchase the property from the second respondent without informing the appellant about the alleged agreement for sale when he was aware of the fact that appellant was about to purchase the suit property from the second respondent.

5. The learned trial Judge found that there was a concluded contract for sale in favour of the first respondent and that the said contract for sale was valid and binding on the second respondent. The learned Judge further found that the first respondent was entitled to the relief of specific performance and that the

appellant was not a *bona fide* purchaser for valve without notice of the agreement for sale. In this view, the learned Judge passed a decree in favour of the first respondent for the specific performance of the said contract for sale against the second respondent and the appellant. - Hence this appeal.

6 In the light of the arguments advanced by the learned counsel for both sides, the following points arise for determination in this appeal: (1) Whether there has been a concluded contract between respondents 1 and 2 which could be specifically enforced at the instance of the first respondent? (2) Whether the first respondent has been ready and willing to perform his part of the contract and whether he is entitled to a decree for specific performance of the contract of sale alleged by him? Whether the second respondent is entitled to raise this ground in the appeal? (3) Assuming that there was a concluded contract between respondents 1 and 2, whether the first respondent would be disentitled to enforce the contract in view of the fact that he had taken back the advance amount of Rs. 13,000? (4) Whether the appellant is a *bona fide* purchaser for value without notice of the alleged contract for sale between respondents 1 and 2?

7. Point No. 1 : Mr. Kesava Iyengar contended that Exhibit P-1 receipt did not create any concluded contract between respondents 1 and 2. Exhibit P-1 only contemplates a contract for sale being entered into on a stamp paper in writing between the parties. According to the learned counsel in order to find out whether there was a concluded contract between respondents 1 and 2, the entire correspondence that passed between them had to be looked into and a perusal of the correspondence would disclose that the parties at no time were *ad idem* and no concluded contract for sale came into existence. Mr. Kesava Iyengar relied upon condition No 7 in Exhibit P-1 which stated "The vendor shall execute a regular agreement of sale on stamp paper within 15 days from this date", and emphasised upon the fact that pursuant to Exhibit P-1, a draft agreement Exhibit P-4 was sent by the first respondent for approval of the second respondent. The second respondent, however, wanted certain conditions to be incorporated in the agreement and for that purpose returned the draft agreement to the first respondent. Thereafter the second respondent made it clear to the first respondent that he would sign the draft agreement provided he was given more time to complete the sale transaction and that he was paid a further advance of Rs. 60,000. Since the first respondent did not agree to these terms, the second respondent informed the first respondent that he would not be in a position to enter into a contract for sale. The learned counsel also stated that when the second respondent demanded a further sum of Rs. 60,000 the first respondent wanted the second respondent to execute a mortgage for the amount for which the second respondent was not prepared. In this view, according to the learned counsel, respondents 1 and 2 were never in agreement with regard to the essential terms of the contract for sale and therefore, there was no concluded contract.

8. Mr. T. R Ramachandran, on the other hand, argued that a perusal of Exhibit P-1 would make it clear that there was a concluded contract. The fact that there was a clause in Exhibit P-1 that a regular agreement for sale on stamp paper would be executed within 15 days would not detract from the fact that Exhibit P-1 was a valid and concluded contract. The execution of a regular agreement for sale was only a formal matter. Similarly, the fact that there was some discussion about the demand of Rs. 60,000 by the second respondent by way of additional advance and the fact that he wanted some more time would not take away the binding nature of Exhibit P-1 as a concluded contract for sale.

9. It is now settled that if a document which is entered into between two parties and which is relied on as constituting a contract contemplates the execution of a further regular agreement between the parties, it is a matter of construction whether the execution of a further contract is a condition of the terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the original agreement should be performed. In the former case, there cannot be any enforceable contract unless the condition is fulfilled or on the ground that law does not recognise a contract to enter

into a contract. In *Ridgway* v. *Wharton*[1] Lord Cranworth observed that the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.

10. In *Hatzfeld Wildenburg* v. *Alexander*[2], Parker, J. observed thus :

> "It appears to be well-settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored".

In *Harichand* v. *Govind*[3], which has been relied upon by the learned single Judge and by Mr. T. R. Ramachandran, the Privy Council has observed thus:

> "Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Wharton*[1], the fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement".

Having followed the principle laid down in *Wharton's case*[1], and *Alexander's case*[2], the Privy Council were of the view that the facts before them were wholly different from the facts in the above two cases. It may be mentioned that in that case the original documents which were in Gujarati clearly showed that the parties had come to a definite and complete agreement on the subject of the sale and that the reservation in respect of a formal document to be prepared by a vakil only meant that it should be put into proper shape and in legal phraseology with any subsidiary terms that the vakil might consider necessary for insertion in formal document. It is on these facts the Privy Council distinguished the facts of the case from the facts in *Wharton's case*[1], and *Alexander's case*[2].

12. As a matter of fact, in *Currimbhoy and Company* v. *Creet*[3], the Privy Council followed the observations of Parker, J., in *Alexander's case*[2], and stated that the principle of the English law as stated by Parker, J., would be applicable in India.

13. A similar question arose for consideration before the Bench of the Calcutta High Court in *Gostho Behari* v. *Surs' Estates Limited*[4], and the Bench observed thus :

> "The second point of the respondent in support of the judgment was that this was not a concluded contract on the ground that it was subject to an agreement for sale. The essential question on this branch of law is to find out whether the formal document is of such a nature that it was the very condition of that contract

1. (1857) 6 H. L. C. 238.
2. (1912) 1 Ch. 284.
3. (1923) 50 I.A. 25 : 44 M. L. J. 608 : 17 L. W. 572 : A.I. R. 1923 P. C. 47

1. (1857) 6 H. L. C. 238.
2. (1912) 1 Ch. 284.
3. (1933) 64 M.L J. 103 : 60 I. A. 297 : 37 L.W. 253 : 60 I. A. 297. : A. I. R. 1933 P.C. 29.
4. A. I. R. 1960 Cal, 752.

or whether it was merely commemorative of the evidence on the point."

The learned Judges then referred to the decision of the Privy Council in *Harichand* v. *Govind*[1], *Currimbhoy and Company* v. *Creet*[2], and *Shankarlal Narayandas Mandade* v. *New Mofussil Company Limited*[3], and held that on the facts of the case the contract to sell was not subject to any formal agreement of the nature as to preclude the conclusion or inference that there was already a concluded contract for sale.

14. Mr. Ramachandran cited the Full Bench decision of the Allahabad High Court in *Deep Chandra* v. *Sajiad Ali Khrn*[4], in support of the proposition that a document would be record of the term of a validly concluded contract for sale between the parties and the fact that it was described and called as receipt would be immaterial. We are of the view that this case does not in any way run counter to the decision of the Privy Council in *Currimbhoys' case*[2], which has followed the observations of Parker, J., on *Alexander' case*[5], Agarwala, J., has laid down the ratio thus:—

"Where all the terms of a contract are agreed upon, but the parties desire that the contract shall go through the form of a formal document, then the mere fact that there is no agreement upon the shape that the formal document should take will not render the agreement inconclusive. Where however, parties expressly declare that the agreement is subject to a formal contract it has been held that these words indicate not merely the desire of the parties that the terms already agreed upon shall be put down in the shape of a formal document. but that they indicate something more, namely, that the parties will have further to make up their minds in regard to the minor terms of the contract and that the contract will not be deemed to be concluded till then. This is the effect of decided cases with regard to the implications of the special formula subject to a formal contract."

The fact that the judgment of the Allahabad High Court has been confirmed by the Supreme Court in *Lala Durga Prasad* v. *Lala Deep Chand*[1], does not in any manner alter the principle of law that is deducible from the decision of the Privy Council in *Currimbhoy's case*[2]. It is clear from paragraphs 28 to 31 in the judgment of the Supreme Court that on the entirety of the evidence in the case, inclusive of the admission in writing that the contract was a concluded one, the Supreme Court came to the conclusion there was a final concluded contract for sale.

15. A similar question arose in *Spottiswoods Ballantyne and Company Limited* v. *Doreen Appliances Limited*[3]. There, the plaintiffs who were owners of a lease of premises, by a letter written by their agents, agreed to let the premises to the defendants, subject in the usual way to your references being satisfactory, and to the terms of a formal agreement to be prepared by their (the plaintiffs') solicitors. Thereafter, the plaintiffs' solicitors drew up a draft lease, which was sent to the defendants who agreed to the terms with the plaintiffs' agents. A few days later, the plaintiffs refused to proceed with the agreement to let the premises to the defendants and called on them to remove their machinery and to vacate the premises. As the defendants refused to do so, the plaintiffs brought an action to recover possession, and the defendants counter claimed for specific performance of the agreement by the plaintiffs to give a lease of the premises to them. Lord Greene, M. R. observed thus :

"The question for our determination is very short, and one, and which, to my mind, with all respect to the learned Judge, has a clear answer. It turns on the mean-

1. 44 M L. J. 608 : 17 L. W, 572 : A. I. R. 1923 P. C. 47.
2. 64 M. L. J. 103 : 37 L. W. 253 : A. I. R. 1933 P. C. 29.
3. (1946) 2 M. L. J. 259 : 59 L. W. 370 : 73 I. A. 98 (2) : A. I. R. 1946 P. C. 97.
4. A. I. R. 1951 All. 93. (F. B.)
5. (1912) 1 Ch. 284.

1. (1954) 1 M. L. J. 60 : 1954 S. C. J. 23 : 1954 S. C. R. 360 : 67 : L. W. 945 : A. I. R. 1954 S. C. 75.
2. 64 M. L. J. 103 : 37 L. W. 253 : A I. R. 1933 P. C. 29.
3 .(1942) 2 K. B. 32.

ing of the letter of 1st August 1941, the crucial words being those which refer to a formal agreement being entered into. It is said by the defendants that the words in the letter mean nothing more than that, as soon as the solicitors for the plaintiffs had put into formal shape the matters on which the parties were in agreement, a binding, unconditional contract would come into existence, notwithstanding that the formal document in which those terms were to be set out was never signed and exchanged by the parties. On the other hand, the plaintiffs contend that the language means that no contract was to exist between the parties unless and until a formal agreement had been entered into. In my opinion, the second construction is unquestionably right. I am quite unable to construe the words 'subject to terms of a formal agreement to be prepared by their solicitors' as meaning that the formal agreement referred to is not one which is to be executed by the parties in the usual way. An unexecuted document would not be a formal agreement.......The real fact of the matter is that the usual language used here is equivalent to the common and more concise phrase 'subject to contract' and it is well-settled that the phrase makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way."

16. In *Branca* v. *Cobarro*[1], the question whether an informal document does or does not constitute a document or whether it is a mere document in contemplation of a contract coming into existence on a formal document being entered into arose for consideration. On the facts of the case Lord Greene, M. R. held that both the parties were determined to hold themselves and one another bound by the provisional contract already entered into. This case turned on its own facts.

17. In *Sriramulu* v. *Aswatha Narayna*[2], Ramaswami, J., observed as follows :

"It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was executed. We do not accept this argument as correct. It is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case."

After referring to the evidence in the case the learned Judge held that it was not possible to accept the contention that the oral agreement was ineffective in law because there was no execution of any formal document.

18. It is in the light of these principles, we have to consider the question whether the provisions in Exhibit P-1 for the execution of a regular agreement is one of the bargain between the parties under Exhibit P-1. It is also necessary in this context to refer to another settled principle of law, *viz.*, when there is a written document which is followed by further negotiations in the form of correspondence, the entirety of the correspondence has to be looked into to find out whether there has been a completed contract or not. The authority for this proposition is found in *Bristol Cardiff and Swansea Aerated Bread Company* v. *Maggs*[1]. There, *M*, a baker, on the 29th May, 1889 wrote to *G*, a director of an Aerated Bread Company the following letter—

"I beg to submit to you the following conditions for disposal of my business carried on at 15, Duke Street, Cardiff. Lease and goodwill, £450 (lease from the 29th of September, 1888, for fourteen years. All

1. (1947) K. B. 854 : (1947) 2 All E.R. 101.
2. (1968) 2 S. C. J. 901 : (1969) 1 M. L. J. (S. C.) 6 : (1969) 1 An. W. R. (S. C.) 6 : (1968) 3 S C. R. 387 : A. I. R. 1968 S. C. 1028.

1. 44 Ch.D. 616.

fixtures, fittings, utensils and *C.* stock-in-trade connected with the premises to be taken at valuation. Yours truly *R. M.* This offer to hold good for ten days."

On the 1st of June, 1889 *G* replied "I accept your offer for shop and lease and c, 15, Duke Street, Cardiff, Yours truly *J. G* (for *B. C.* and *S.* Aerated Bread Company.). Mr. *R. M.*"

M's solicitor then sent *G* a formal memorandum of agreement comprising several terms not expressed in the two letters. The companv's solicitors added a clause restricting *M* from carrying on a similar business within certain limits. A correspondence then followed between the solicitors for the company and for *M* respecting the terms of the memorandum, and on 7th June, 1889 *M*'s solicitor wrote withdrawing the offer. In an action by the company against *M*, for specific performance of the contract alleged to be constituted by the two original letters it was held that although these two letters would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the company had themselves shown that the agreement was not complete by stipulating afterwards for an important additional term, namely, the restriction on *M*'s carrying on business, which kept the whole matter of purchase and sale in a state of negotiation only, and that *M* was therefore, at liberty to put an end to the negotiations by withdr wing his offer, though within ten days mentioned in his letter. Kay, J., after referring to the decision of the House of Lords observed as follows:

"In my opinion, the decision of *Hussey* v. *Hone Payne*[1], completely covers this case. I understand it to mean, that if two letters standing alone would be evidence of a sufficient contract, a negotiation for an important term of the purchase and sale carried on afterwards is enough to shew that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule".

19. In *Hussey* v. *Hono Payne*[1], followed by the Chancery Division in the above case, the House of Lords held thus—

"The Court must look at the whole correspondence from the beginning to end. Of course if we find a few letters which are perfectly plain in themselves, which shew an agreement and the parties do not follow them up by further correspondence, we have a comparatively easy case, but where each letter is followed immediately by another which suggests something elso as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter."

20. It is, therefore, clear that in this case in the light of the contentions of the parties, it is open to us to refer to the entire correspondence that followed Exhibit P-1 to find out whether Exhibit P-1 constituted a concluded contract or not Exhibit P-1 receipt itself is given subject to the terms and conditions mentioned therein. It states that the sale shall be completed within 45 days from the date of the advocate for the first respondent passing the title. The second respondent has to produce the encumbrance cetificate for a period of 13 years prior to the date of Exhibit P-1 and also obtain a certificate of satisfaction of the claim of his brother. The second respondent has also to produce receipts for payment of all taxes and other demands. Clause 6 of Exhibit P-1 clearly states that if the transaction is not or could not be completed within the said 45 days or the extended time for any reason, the second respondent shall return the amount of advance with interest thereon at 12 per cent. per annum from the date of Exhibit P-1. Clause 7 of Exhibit P-1 states that the second respondent shall execute a regular agreement of sale on stamp paper within 15 days from the date of Exhibit P-1. Though no doubt, Exhibit P-1 has specified the consideration amount and the property to be sold, a perusal of Exhibit P-1 leaves the impression that a regular agreement of sale on a stamp paper has to be executed within 15 days from the date of Exhibit P-1 and that the said recital is a condition of the bargain between the parties under Exhibit P-1. Further, Clause 6 of Exhibit P-1 gives an option to the second respondent to return the advance amount with interest at 12 per cent. if the transaction could not be completed within 45 days as stipulated therein. It is not disputed that the second respondent refunded the amount of advance and stated that he could not com-

1. 4 A. C. 811.

plete the transaction within a reasonable time. This clause itself would show that Exhibit P-1 was not intended to be a concluded contract.

21. In *Baijnath* v. *Kshetrahari Sarkar*[1], one Kshetrahari through his agent Gopeswar entered into an oral arrangement for the grant of a lease of the suit property for a term of 81 years at the stipulated rent with one Baijnath. The latter in turn filed a suit for specific performance of the contract of lease. The defendants contended that there was no concluded contract between the parties. The learned Judge held as follows—

> "Under section 25 of the Specific Relief Act, a lessor is bound to give the lessee a title free from reasonable doubt, and where a prospective lessee demands title deeds from the prospective lessor for his investigation and approval, it cannot be said that there has been a final and concluded agreement between them, although most other material terms may have been agreed upon by them. In such a case the lessee is free to back out of the contract if he is not satisfied about the lessor's title and so long as one party is left free to back out of a contract at his choice, it cannot be said that any binding contract has been arrived at between the parties."

A contention was urged on behalf of the plaintiff that the plaintiff is not insisting upon proof of defendants' title, and is ready to take the property with such title as the defendant has got. In other words, it was stated that the plaintiff was prepared to waive his right of investigation of the defendant's title. The Bench answered thus—

> "But subsequent waiver of his rights by the plaintiff cannot afford any criterion for determining whether there was a binding contract between himself and the defendant at the date of the alleged contract. The true test for determining whether there was such a binding contract is whether the parties were of one mind on all material terms of the contract at the time it is said to have been finalised between them and whether they intended that the matter was closed and concluded between them.".

The principles laid down by the Calcutta High Court applies to the facts of this case. Exhibit P-1, as already stated, provided that the first respondent's advocate should pass the title and that the certificate of the brother's claim and receipts for payment of public demands should be produced. The second respondent was also given the option to return the advance amount if he could not comply with the conditions within the stipulated time. The second respondent acted according to the provisions of clause 6 of Exhibit P-1. In addition, it was further stated under clause 7 that a regular agreement should be executed within 15 days. In the circumstances we are not persuaded to accept the argument of Mr. Ramachandran that the first respondent is willing to take the sale deed without proof of title or production of the document mentioned in Exhibit P-1 or Exhibit P-4. On the other hand, we are of opinion that Exhibit P-1 was not intended to be a concluded contract.

22. The above conclusion of ours is fortified by the events that followed. On 9th February, 1974, the first respondent's counsel addressed a letter to the second respondent's counsel enclosing Exhibit P-4, draft agreement for sale. It stated that if the second respondent's counsel approved of the draft, the same might be typed on stamp paper and returned. It also called upon the counsel to send certified copies of the order recording satisfaction of the suit claim in O. S. No. 3137 of 1973 and the order raising the attachment of the property in I. A. No. 8619 of 1973. The draft agreement itself contained as many as seven clauses many of which were not found in Exhibit P-1. Clause 2 states that the first respondent should pay a sum of Rs. 17,500 as advance of which Rs. 3,000 had been paid under Exhibit P-1 and a cheque for Rs. 10,000 was sent on 6th February, 1974, for settling the claims of the plaintiff in O. S. No. 3137 of 1973. It further stated that Rs. 4,500 had been paid by the first respon-

1. A. I. R. 1955 Cal. 210.

dent's counsel on that date. Clause 3 called upon the second respondent's counsel to furnish various documents such as certified copy of the order recording satisfaction of the suit claim against the second respondent in O. S. No. 3137 of 1974 on the file of the first Assistant Judge, City Civil Court, and raising the attachment before judgment of the property agreed to be sold; certified copy of the order of Court amending the compromise decree giving the correct R. S. number of the property wrongly printed as R. S. No. 5306 in the printed copy of the decree in O. S. A. No. 54 of1963; a copy of the extract from the permanent land register showing the name of the vendor as the owner and the boundaries numbers and the extent of the property agreed to be sold; and receipt for the payment of the urban land tax paid up to current fasli year and an extract from the Corporation property register and the receipt for the payment of the tax due to the Corporation of Madras relating to the said property upto the end of March, 1974; correspondence relating to the property from the Official Trustee and encumbrance certificate relating to the property agreed to be sold and other papers and documents as may be required by the advocate. Clause 6 states that if the second respondent committed default in performing any of his obligations mentioned above, he shall return the advance with interest at 12 per cent. per annum from the date and if the time for completing the transaction is extended at the direction of the first respondent, within the extended period. Clause 7 states that if the first respondent failed to complete the trasaction within a reasonable time after the second respondent had complied with all the terms and conditions, he should be liable to pay the first respondent a sum of Rs. 1,000 as liquidated damages and receive only the balance of Rs. 16,500. It is, therefore, seen that Exhibit P-4 draft agreement contains many clauses that were not in Exhibit P-1. In Exhibit P-1 the advance amount was mentioned as only Rs. 3,000. In Exhibit P-4 we find the advance as Rs. 17,504 and even before Exhibit P-4 draft agreement was sent to the second respondent a sum of Rs. 10,000 had been paid towards advance. Similarly, clause 3 of Exhibit P-4 states that the documents mentioned therein as (*a*) to (*f*) should be furnished to the advocate within 15 days from the date of Exhibit P-4. Some of the documents mentioned in Clause 3 are not referred to in Exhibit P-1, such as copy of the amended decree in O. S. A. No. 54 of 1963, extract from the permanent land register, extract from the Corporation property register and correspondence relating to the handing over of the property agreed to be sold by the Official Trustee. Similarlly, the clause 7 as regards the provision for payment of liquidated damages of Rs. 1,000 by the first respondent in case he commits default. We are therefore, of the view that when the first respondent sent the draft agreement Exhibit P-4 through his counsel for the approval of the second respondent's counsel, he considered it to be the concluded and binding agreement to be entered into between the parties. However, the second respondent's counsel very promptly returned the draft agreement to the first respondent's counsel under Exibit P-5 pointing out to the fact that out of the advance of Rs. 17,500 mentioned in Exhibit P-4 only a sum of Rs. 13,000 had been received and the balance remained to be paid to the second respondent for settling the claim of M. L. Abdul Jabbar in O. S. No. 3137 of 1973. It further stated that a portion of the property had been set apart for charity and that consequently the revenue authorities proposed to treat the property as trust property and had not claimed any tax under the urban land tax, and the Commissioner of urban land tax had asked the second respondent to file an application for subdividing the property and levying tax for the same. The second respondent's counsel therefore, called upon the first respondent's counsel to make the necessary alterations in Exhibit P-4 and also send the balance sum of Rs. 4,500 by cheque in his favour so that the claim of M. L. Abdul Jabbar might be settled. Subject to the amendments, the letter stated that the draft agreement was approved. We are not persuaded to accept Mr. Ramachandran's argument that the draft agreement has been approved by the second respondent's counsel by Exhibit P-3 letter. On the other hand, the draft agreement was returned with certain specific suggestions for atlerations and called upon first respondent to remit Rs. 4,500. In the circumstances unless and until another draft agreement had been prepared on the lines suggested in Exhibit P-5 letter and the same was apporved by the

second respondent, it could not be said that the parties were at consensus *ad idem.* Exhibit P-5 was followed by Exhibit P-6 letter, dated 22nd February, 1974 sent by the second respondent's counsel to the first respondent's counsel. Exhibit P-6 stated that it would not be possible to get the patta transferred within the period fixed by the first respondent and that therefore the second respondent could not give satisfaction regarding title, and as it would take at least six months time, the second respondent did not propose to keep the contract alive. It further stated that the second respondent wanted further moneys urgently to meet the demands of his creditors who were threatening to file a suit and get attachments and that the first respondent was not willing to advance more than Rs. 17,500. In these circumstances, Exhibit P-6 made it clear that the second respondent could not execute any agreement. The sum of Rs. 13,000 was also returned by cheque along with Exhibit P-6. The post script stated that the second respondent's counsel had been to the house of the first respondent's counsel in person to hand over the money on the evening of 25th February, 1974. Since the first respondent's counsel refused to receive the letter and the money on the ground that he had no instructions from his client, even though the first respondent was personally present at that time, the second respondent's counsel was sending the letter and the cheque by registered post. Exhibit P-6 is conclusive proof that the second respondent had refused to sign the draft agreement even before the first respondent's counsel had sent it back with the necessary alterations and the sum of Rs. 4,500 as stated in Exhibit P-5. The amount was returned within 45 days mentioned in Exhibit P-1 in terms of clause 6 thereof. Exhibit P-6 was replied to by the first respondent's counsel under Exhibit P-7 dated 1st March, 1974. In Exhibit P-7 after referring to the contents of the letter dated 22nd February, 1974 sent by the second respondent, the first respondent's counsel stated that there was a discussion between the two counsel during which the second respondent's counsel is said to have stated that he was not prepared to get the P. L. register entry which stood in the name of the second respondent's father Abdul Salam transferred in the name of the second respondent or apply for copy of the decree amended and that the first respondent had expressed his willingness to give the second respondent time for obtaining and furnishing the same. It also refers to the fact that during the discussion the second respondent's counsel wanted Rs. 60,000 as further advance to enable his client to settle the claims of other creditors and that first respondent stated that he wolud advance that additional amount by paying the same directly to the creditors against receipts provided the second respondent agreed to register the agreement for sale and also agreed to pay reasonable interest from the date of the period fixed in the agreement which was refused to be accepted by the second respondent's counsel. The letter also refers to the fact that the first respondent and his counsel agreed to advance the amount needed by the second respondent on the security of the property which of course was not acceptable to the second respondent's counsel. Finally, the letter stated that the first respondent did not acquiesce in the second respondent cancelling the agreement approved by him subject to the modification mentioned in the earlier letter. The next letter is Exhibit P-8 sent by the second respondent's counsel to the first respondent's counsel. The letter referred to what happened between the counsel on 25th February, 1974, *viz.*, that the second respondent wanted Rs. 60,000, that he has stated that the property was registered as trust property in the urban land tax register, that it would take some time to effect transfer of the registry, that the amount should be paid and no interest should be charged on the amount of advance and that he would execute the sale deed within one month after the property was registered in the name of the second respondent, and to this the answer of the first respondent was that he would pay the amount directly to the creditors and that the second respondent should pay interest on the amount to be advanced. This was not agreeable to the second respondent. Finally, the letter stated that there was no registered agreement, that the entire matter was at the stage of negotiations and that the cheque was being returned. To this the first respondent's counsel sent Exhibit P-9 reply on 7th

March, 1974. The said letter contained particulars of the discussion the parties had and about the advice the counsel had given to the first respondent, with regard to the completion of the transaction. It also referred to certain agreements arrived at between the parties subsequent to Exhibit P-1 receipt, one of which was that the clause relating to the payment of interest on the amount of advance mentioned in the receipt dated 26th January, 1974, would apply to the total amount of Rs. 17,500 to be advanced. The letter further clearly stated that the counsel drafted the agreement embodying the terms and conditions agreed to between the parties and sent it with a covering letter dated 19th February, 1974. It also refers to the fact that the counsel prepared a revised draft as per the letter of the second respondent's counsel sent on 19th January, 1974, and that on the night of 22nd February, 1974 the second respondent's counsel wanted Rs. 60,000 more. It also refers to the fact that the second respondent was willing to extend the time and also pay such amounts that might become necessary on behalf of the second respondent directly to his creditors, but that he insisted that the sum of Rs, 60,000 should be paid directly to him and not to his creditors. The letter further states that without prejudice to the first respondent's right under the concluded agreement, he was willing to advance the further advance required by the second respondent and extend the time by a reasonable period for completing the transaction on the second respondent executing and registering the agreeement as agreed to between the parties. The post script stated that the first respondent was prepared to send a cheque for the sum of Rs. 4,500 and pay the balance at the time of registration of the agreement. Exhibit P-11 dated 18th March, 1974, was sent by the first respondent's counsel to the second respondent's counsel. It refers to the fact that he had already returned the cheque along with his letter dated 7th March, 1974, and that the former might send the cheque and the original draft agreement to the first respondent at his Bangalore address. Thereafter on 19th March, 1974, the second respondent's counsel wrote Exhibit P-12 to the first respondent at his Bangalore address returning the cheque for Rs. 13,000 and also the original agreement. It also stated that the agreement had been cancelled and was no longer in force. This was answered by the first respondent by his letter Exhibit P 13 dated 28th March, 1974 addressed to the second respondent's counsel. While acknowledging the cheque for Rs. 13,000 it stated as follows :

> "I have received the same without prejudice to my right under the agreement to sell by your client, door No. 5, Kandappa Chetti Street, G. T., Madras-1 in my favour".

However, by oversight the first respondent sent back the cheque also to the second respondent's counsel along with his letter, Exhibit P-13. He therefore, addressed Exhibit P-16 to the second respondent's counsel on 30th March, 1974, by which he requested the second respondent's counsel to return the cheque which he would accept without prejudice to his right under the agreement as stated in Exhibit P-13. The cheque was duly returned by the second respondent's counsel along with Exhibit P-14 dated 1st April 1974. Though in Exhibit P-16 the first respondent had stated that his counsel would be sending a detailed reply to the letter sent by the second respondent's counsel on 19th March, 1974, no such letter was sent till 24th June, 1974. On 10th June, 1974 the second respondent executed the sale deed in favour of the appellant for a consideration of Rs. 1,10, 000. On 12th June, 1974, the appellant wrote to Messrs. M. M. Mandalappa, A. G. Balasubramania Mudaliar and Company, informing them that the appellant had purchased the suit property and calling upon them to attorn the tenancy to the appellant and pay the rent directly to the appellant with effect from 11th June, 1974. The second respondent also sent Exhibit P-17 (*a*) to Messrs. M. M. Mandalappa and A. G. Balasubramania Mudaliar and Company informing them that the suit property had been sold to the appellant. Thereafter on 24th June, 1974, the first respondent through another counsel sent the suit notice to the second respondent and the appellant. It is, therefore, clear that from a conspectus of the entire documentary evidence in this case there was no concluded contract at all between the parties, that Exhibit P-1 was not intended to contain the whole of the

term, of the bargain, that Exhibit P-4 draft agreement was not accepted and signed by the second respondent and that the parties were only negotiating with suggestions and counter suggestions and were never at consensus *ad idem*.

23. *Point No.* 2: We proceed to consider the second point on the assumption that Exhibit P-1 evidences a concluded contract for sale between respondents 1 and 2. The contention of Mr. Kesava Iyengar was that there is no averment in the plaint, nor was there evidence to prove that the first respondent was ready and willing to perform his part of the contract. In this connection, the learned counsel relied upon section 16 (*c*) of the Specific Relief Act, 1963, which stated that the Court could not grant a decree for specific performance unless the plaintiff averred and proved that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. No doubt there is no specific issue with regard to this. However, issue No. 4 relates to the question whether the plaintiff is entitled to the specific performance of the contract for sale. In paragraph 14 of the plaint, the first respondent has stated that he had been and was ready and willing to perform his part of the contract and take a conveyance and that both the second respondent and the appellant were bound in law to convey the property to the first respondent. This has been traversed in the written statement. The second respondent has stated in his written statement that apart from the fact that there was no contract for sale at any time, the first respondent received back the sum of Rs. 13,000 paid by him, though stated to be without prejudice. He has also stated that the first respondent was not entitled to the relief of specific performance as he by his own conduct and wilful knowledge of all the facts had allowed the property to be sold by the second respondent to the appellant for a lesser price. The appellant has in paragraph 4 of the written statement stated that at no time the first respondent has expressed his readiness and anxiety to purchase the property.

24. Section 16 (*c*) of the Specific Relief Act, 1963 reads as follows—

"16. Specific performance of a contract cannot be enforced in favour of a person—

(*c*) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation: For the proposes of clause (*c*)—

(*i*) Where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(*ii*) the plaintiff must aver performance of, or readiness and willingness to perform the contract according to its true construction".

This corresponds to section 24 of the Specific Relief Act, 1877.

25. In *Ardeshir* v. *Flora Sassoon*[1], Lord Blanesburgh observed thus:

"In a suit for specific performance the plaintiff has to allege, and if the fact is traversed, he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit".

This was approved by the Supreme Court in *Gomathinayagam Pillai* v. *Palanisami Nadar*[2], Shah, J., speaking for the Court observed as follows—

"The respondent (plaintiff) must in a suit for specific performance of an agreement

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1. (1928) 55 M. L. J. 323 : 55 I. A. 360 : 28 L. W. 257 : A. I. R. 1928 P. C. 208.
2. (1967) 1 S. C. R. 227 ; A. I. R. 1967 S. C. 868.

> plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and, the date of hearing of the suit."

Again, in *Premraj* v. *D. L. F. Limited*[1], Ramaswami, J., speaking for the Bench observed thus—

> "It is well-settled that in a suit for specific performance, the plaintiff should allege that he is ready and willing to perform his part of the contract."

Mr. Ramachandran referred to the decision of the Supreme Court in *Ramesh Chandra* v. *Chunilal*[2], and drew our attention to the following observations—

> "Readiness and willingness cannot be treated as a straitjacket formula These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract."

These observations in our opinion do not in any way detract from the ratio laid down in *Ardeshir* v. *Flora Sassoon*[3], *Gomathinayagam Pillai* v. *Palanisami Nadar*[4], and *Premjraj* v. *D. L. F. Limited*[1],

26. In this case, there is absolutely no evidence on the side of the first respondent to prove that he was ready and willing to perform his part of the contract and such readiness and willingness continued till the date of the decree. It is certainly the duty of the first respondent to have gone into the box and given formal evidence that he was ready and willing to perform his part of the contract and subjected himself to cross-examination. In the absence of the first respondent (sic) stating from the witness box we are unable to find that the first respondent-plaintiff has discharged the duty enjoined on him under section 16. (*c*) of the Specific Relief Act, 1963, entitling him to a decree for specific performance. No doubt, it is not specifically clear from the judgment of the trial Judge whether the question regarding the readiness and willingness of the first respondent to perform his part of the contract was urged before the learned Judge. In our opinion, it would be certainly open to the appellant to raise the question before us Section 16 (*c*) of the Specific Relief Act, 1963 is prohibitory and a duty is cast on Courts by a public statute that specific performance of a contract cannot be granted in favour of a person unless he avers and proves his readiness and willingness to perform his part of the contract. That being the nature of the statute, it would be the duty of the Court to see whether the person who seeks to enforce the contract satisfies. the mandatory provisions of section 16 of the Specific Relief Act, 1963. The Privy Council and the Supeme Court have interpreted the section to mean that if the conditions are not satisfied, the Court is bound to dismiss the suit. Though no precedent is necessary to support this conclusion of ours we shall refer to two decisions in this context. The first one is *Shiba Prasad Singh Srish* v. *Chandra*[1], wherein the Privy Council was called upon to interpret the meaning to be given to the word 'mistake' in section 72 of the Contract Act. The question was not raised, nor evidently argued before the Subordinate Judge and the High Court, and therefore, the respondent raised an objection that no argument could be advanced before the Privy Council based on section 72. However, their Lordships negatived the objections stating that they were unable to exclude from their consideration the provisions of the public statute.

27. In *Surajmull Nagoremull* v. *The Triton Insurance Company Limited*[2] the question was whether a contract for sea insurance was valid even though it was not expressed in a sea policy as provided under section 7 of the Indian Stamp

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1. (1968) 2 S. C. J 951 : (1968) 3 S. C. R. 648 : A. I. R. 1968 S. C. 1355.
2. (1971) 2 S. C. J 619 : (1971) 2 S. C R. 573 : A. I. R. 1971 S. C. 1238.
3. (1978) 55 M. L. J. 523 : A I. R. 1928 P. C. 208.
4. (1967) 1 S. C. R. 227 : A. I. R. 1967 S. C. 868.

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1. (1949) 2 M. L. J. 657 : 62 L. W. 786 : 76 I. A 244 : A. I. R. 1949 P. C. 297.
2. (1925) 52 I. A. 126 : 49 M. L J. 136 : A. I. R 1925 P. C. 83.

Act, 1899. The section had not been pleaded by the defendant in the suit. It was only during the hearing of the appeal before the Privy Council it was discovered that section 7 of the Indian Stamp Act provided that no contract of sea insurance would be valid unless the same was expressed in policies of sea insurance. It was argued by the plaintiff that it was too late to plead it as an answer to the plaintiff's claim. Lord Summer observed thus—

> "The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by a consent of the parties or by a failure to plead or to argue the point at the outset (*Nexon* v. *Albion Marine*[1]). The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases, for which a penalty is exigible. The expression of an agreement for sea insurance, in otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on policy is no more collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of section 7 would defeat the provisions of the law laid down therein."

28. We are not impressed with the submission of Mr. Ramachandran, the learned counsel for the first respondent that a finding should be called for on the issue whether the first respondent was ready and willing to perform his part of the contract and that the first respondent should be given a further opportunity to let in his evidence on the question. We have already pointed out that the question of the first respondent's readiness and willingness to perform his part of the contract has been clearly taken in the written statement. The second respondent has clearly averred that the first respondent had received back the advance amount of Rs. 13,000 and that his past conduct had allowed the property to be sold to the appellant Issue No. 4 relates to the question whether the first respondent is entitled to a decree for specific performance. In the circumstances, it was the duty of the first respondent to have gone into the box and given evidence that notwithstanding the acceptance of Rs. 13,000 he was willing and ready to perform his part of the contract. To give a further opportunity to the first respondent at this stage to let in evidence over again before the trial Judge would be to permit him to fill up the lacuna in the evidence at the expense of the appellant. The point raised by Mr. Kesava Iyengar is a pure question of law and can be decided on the materials available on the records. We therefore, reject the prayer of Mr. Ramachandran for remand to the trial Judge for a finding on this question after giving the first respondent an opportunity to let in evidence.

29. *Point No.* 3 : This point relates to the legal effect to be attached to the conduct of the first respondent in receiving back the advance amount of Rs. 13,000 from the second respondent. Under Exhibit P-13, dated 28th March, 1974, while receiving the cheque for Rs 13,000 the first respondent stated that he was receiving the same without prejudice to his right under the agreement to sell, Exhibit P-1. The contention of Mr. Kesava Iyengar was that inasmuch as the first respondent had received back the advance amount of Rs. 13,000 he could not enforce the agreement and that the words 'without prejudice' used by the first respondent in Exhibit P-13 would not take away the effect of the first respondent having accepted the cancellation of the contract by the second respondent. On the other hand, Mr. T. R. Ramachandran argued that inasmuch as the cheque was accepted 'without prejudice' to the first respondent's right under the contract for sale his right to specifically enforce the contract would not be adversely affected. The effect of the acceptance of the

1. (1867) L. R 2 Exc. 338.

amounts under protest have come up for consideration in cases relating to forfeiture of leases.

30. In *George Henry Devenport* v. *Her Majesty the Queen*[1], a lease of Crown lands for eight years having been granted by the respondent under 31 Vict Ch. 45, subject to the terms and conditions contained in the Agricultural Reserves Act of 1863 and the Leasing Act of 1866, the lessee failed to perform his covenant to cultivate one sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of year was subsequently received by the Government, the latest being in 1873 with full knowledge of the above breach of covenant, but after notification in the Gazettes of 1869, 1870 and 1871, that the same would be received conditionally and without prejudice to the rights of the Government. Thereafter, the Government brought a suit in ejectment on the ground that a forfeiture had accrued. After quoting the case of House of Lords in *Croft* v. *Lumely*[2], the Privy Council observed thus—

> "Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease; a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt."

The Privy Council took the view that assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the conditional acceptance.

31. This case as followed by the Calcutta High Court in *Kali Krishna Tagore* v. *Fuzle Ali Chowdhry*[3], where payments made by the lessee were accepted by the lessor as rent but were kept in suspense subject to payment by the lessee of the remaining amount. It was held that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliyat when called on to do so.

32. Again in *Satyanarayana* v. *Venkataramamurthi*[1] the question arose before a Bench of this Court whether the receipt of rent by the lessor amounted to a waiver of a prior right of forfeiture of the lease It was held that a conditional acceptance of rent by the lessor after default invoking a forfeiture is none the less a waiver.

33. In *Chatu Mia* v. *Mt. Sundari*[2], a Full Bench of the Patna High Court held where after the forfeiture of the lease the lessee remits certain amount to the lessor as rent and intends it as payment of rent and the landlord accepts it only as damages for use and occupation, the acceptance of payment by the landlord must be deemed to be as rent and operates as a waiver of the forfeiture.

34. We are of the view that the same principle applies to the case on hand. The second respondent had already stated that he was not intending to execute the draft contract for sale and that the contract was no longer in existence. Assuming that Exhibit P-1 amounted to a concluded contract for sale the first respondent has accepted the refund amount of Rs. 13,000 knowing full well that the second respondent has cancelled the contract. In the context, therefore, the mere conditional acceptance by the use of the words 'without prejudice' to his rights under the contract for sale cannot in any manner derogate from the fact that he had acquisced in the breach of the contract committed by the second respondent. As was observed in *Doed Morecraft* v. *Meux*[3], what was of importance was what the first respondent did and not what he said. The first respondent had received the money back and the effect of it cannot be taken away by the words 'without prejudice' which he said.

35. Mr. Ramachandran cited the decision of the Supreme Court in *Ganga Dutt Murarka* v. *Kartik Chandar Das*[4], wherein the

1. 3 A. C. 115.
2. 6 H. L. C. 672.
3. (1983) I. L. R. 9 Cal, 843,

1. A. I. R. 1935 Mad. 454.
2. A. I. R. 1945 Pat. 260.
3. (1825) 1 Car. and P. 347.
4. (1961) 3 S. C. R 813 : (1962) 2 M. L. J. (S. C.) 161 . (1962) 2 S. C J. 584 : (1962) 2 An. W. R. (S. C) 161 : A. I. R 1961 S. C. 1067,

Supreme Court held that "where a contractual tenancy to which the rent control legislation applied, had expired by efflux of time or by determination by notice to quit and the tenant continued in possession of the premises, acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord had assented to a new contractual tenancy". No exception can be taken to this proposition of law laid down by the Supreme Court. The effect of the rent control legislation was that notwithstanding the determination of the tenancy, the tenant continued to be a statutory tenant by operation of the statute. Consequently, the receipt of rent after the determination of the tenancy by notice to quit cannot create a new contractual tenancy. This decision cannot apply to the situation with which we are now concerned. We therefore hold that assuming Exhibit P-1 constituted a concluded contract for sale, the acceptance of the refund amount of Rs. 13,000 by the first respondent waived his right to enforce the contract and that his right cannot be preserved merely because he had accepted the amount 'without prejudice' to his right.

36. The last of the points that arises for consideration is whether the appellant is a *bona fide* purchaser for value without notice of the contract for sale. D. W. 1, a partner of the appellant firm had given evidence regarding the payment of consideration. The first respondent has not gone into the box. There is clear evidence to show that the appellant purchased the property for value. As regards notice D. W. 1 has given evidence that he was not aware of the contract for sale, that before purchasing the property he inspected the property, when one Jayaraman, a gumastha and Athimoolam the watchman, were present and no business was being carried on there. The first respondent has not gone into the box to rebut the evidence given by D. W. 1. The learned counsel for the first respondent relied upon the fact that D. W. 1 has stated that on 4th March, 1974, he was told by the broker that there was an original offer for a sum of Rs. 1,22,500 from the first respondent and that ultimately, the sale consideration was fixed at Rs. 1,10,000. The statement cannot in any way be taken to mean that the appellant was aware of the fact that there was a subsisting contract on the date of his purchase. On the other hand, it is borne out by evidence that the first respondent had already taken back the refund amount and consequently even if there had been any such valid and enforceable contract for sale, he had waived his right to enforce the contract. In the circumstances, we hold that the appellant is a *bona fide* purchaser for value without notice of any subsisting contract for sale.

37. In the result, we set aside the judgmen and decree of the trial Judge and allow the appeal with costs throughout and dismiss the suit.

38. The memorandum of cross-objections filed by the first respondent with regard to costs disallowed by the trial Judge has also to be dismissed and we dismiss the same without costs.

The Order of the Court was made by

K. B. N. Singh, CJ.—After the judgment was delivered, the learned counsel for the respondent has orally prayed for leave to appeal to the Supreme Court under Article 133 of the Constitution of India. As we have decided the case after taking into consideration all the relevant evidence and after following the decisions of the Supreme Court, we are not satisfied that there is any substantial question of law of general importance which needs to be decided by the Supreme Court.

40. The prayer for certificate of leave to appeal to the Supreme Court is rejected.

R. S. —— *Appeal allowed.*

[END OF VOLUME (1983) 1 M. L. J. [REPORTS]